Petition

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

HOSPAH COAL COMPANY, SANTA FE INDUSTRIES, INC., THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY and SANTA FE MINING, INC.,

Petitioners,

v.

CHACO ENERGY COMPANY and TEXAS UTILITIES COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a federal district court in the state designated in a contractual forum selection clause may enjoin the parties from further prosecuting an action filed, in breach of the clause, in another federal district court?

2. Where similar or identical actions are pending in two federal district courts, whether the court in the second-filed action must give priority to the first-filed action, even though the court in the second action finds that:

   a. the second forum is designated in an applicable and enforceable forum selection clause; and

   b. equitable considerations and the balance of convenience strongly favor the second forum?*

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* *List of Parties.* Petitioners, Plaintiffs in the New Mexico Federal District Court and Appellees in the Tenth Circuit, are Hospah Coal Company (Hospah), a Delaware corporation having its principal place of business in Albuquerque, New Mexico; Santa Fe Industries, Inc. (SFI), a Delaware corporation having its principal place of business in Chicago, Illinois; The Atchison, Topeka, and Santa Fe Railway Company (AT&SF), a Delaware corporation having its principal place of business in Kansas; and Santa Fe Mining, Inc. (SFM), a Kansas corporation having its principal place of business in Albuquerque, New Mexico. Hospah, AT&SF, and SFM are wholly-owned subsidiaries of SFI. The Defendants in the New Mexico Action are Chaco Energy Company (Chaco), a New Mexico corporation having its principal place of business in Albuquerque, New Mexico; and Texas Utilities Company (TUC), a Texas corporation having its principal place of business in Texas. Chaco is a wholly-owned subsidiary of TUC.

Listing of Parent Companies, Subsidiaries, and Affiliates:

SFI is the parent corporation of AT&SF and SFM. Hospah is a wholly-owned subsidiary of SFM. Except for qualifying shares owned by individual directors, SFI, SFM and Hospah have no subsidiaries other than wholly-owned subsidiaries. AT&SF has the following subsidiaries which are not wholly owned:

Alameda Belt Line
The Belt Railway Company of Chicago
Central California Traction Company
The Denver Union Terminal Railway Company
Houston Belt & Terminal Railway Company
Joliet Union Depot Company
Kansas City Terminal Railway Company
The Oakland Terminal Railway
Oklahoma City Junction Railway Company
The Pueblo Union Depot and Railway Company
St. Joseph Terminal Railroad Company
Sunset Railway Company
Texas City Terminal Railway Company
Trailer Train Company
The Wichita Union Terminal Railway Company

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CHACO ENERGY COMPANY and TEXAS UTILITIES COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners Hospah Coal Company ("Hospah"), Santa Fe Industries, Inc. ("SFI"), The Atchison, Topeka, and Santa Fe Railway Company ("AT&SF"), and Santa Fe Mining, Inc. ("SFM"), respectfully pray that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Tenth Circuit entered March 29, 1982.

OPINIONS BELOW

The United States District Court for the District of New Mexico granted a Preliminary Injunction (App. B) on January 11, 1982, having earlier announced its findings and decision from the bench following hearing on January 8, 1982 (App. C). The District Court filed no separate opinion. The Court of Appeals for the Tenth

Circuit reversed this preliminary injunction by Opinion filed March 29, 1982 (App. A), as yet unreported.

JURISDICTION OF THIS COURT

Jurisdiction of this Court to review the decision of the United States Court of Appeals for the Tenth Circuit exists by virtue of 28 U.S.C. § 1254.

STATUTES AND RULES OF COURT INVOLVED

28 U.S.C. § 1404(a):

> (a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

28 U.S.C. § 1406(a):

> (a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

Federal Rules of Civil Procedure, Rule 12(b):

> (b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the reponsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (3) improper venue . . . .

STATEMENT OF THE CASE

On April 15, 1977, Hospah Coal Company (Hospah), a wholly-owned indirect subsidiary of Santa Fe Industries, Inc. (SFI), leased substantial coal reserves in McKinley County, New Mexico to Chaco Energy Company (Chaco), a wholly-owned subsidiary of Texas Utilities Company (TUC). The Lease, which includes coal reserves owned in fee by Hospah and the sublease of coal leases issued

by the State of New Mexico, provides for the mining, over a period of 35 years, of 325,000,000 tons of coal at two locations, and requires the payment of royalties to Hospah in the sum of over $1,000,000,000 (R. Vol. I-211).

The Coal Lease was amended February 12, 1981 (App. E). As amended, the Coal Lease provides in pertinent part:

> *Section 16(A).* Choice of Law and Forum. This lease was executed in New Mexico, concerns land located in New Mexico, and will be performed in New Mexico. This lease and all matters arising out of or relating to this lease shall be governed and construed according to the law of New Mexico. Because New Mexico would be the only appropriate and convenient forum for any judicial proceeding involving this lease, the parties agree that all judicial proceedings arising out of or relating to this lease shall be brought in New Mexico.
>
> *Section 16(B). Available Remedies.*
>
> (i) . . . The parties intend that this lease shall be specifically enforceable against either party . . . .[1]

On the same day (April 15, 1977), Hospah and TUC executed a Surety Agreement, under which TUC assured Chaco's performance of the Coal Lease. The Surety Agreement incorporated the Coal Lease by reference, and the parties agreed that the Coal Lease "together with the Surety Agreement" constituted the entire agreement concerning the coal. App. F at 48a.[2] The Coal Lease was

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[1] Copies of the Coal Lease and Surety Agreement have been lodged with the Clerk of this Court.

[2] TUC argued in the lower Courts that the Surety Agreement incorporated the Coal Lease only in the event the Coal Lease were rejected in bankruptcy. But the Surety Agreement provides in Section 3(c): "In the event of rejection of the Coal Lease . . . TUC shall immediately assume and be liable to perform . . . all obligations . . . under the Coal Lease . . . which Coal Lease is incorporated herein by reference. . . ." See also n.15 *infra*.

executed in New Mexico, as was the February 12, 1981 Modification; the Surety Agreement was executed by TUC in Texas and was delivered to and executed by Hospah in New Mexico.

After four years of performance under the Coal Lease (R. Vol. I-210-211) and payment of over $24,000,000 in Advance Royalty Payments,[3] TUC and Chaco filed suit the afternoon of Friday, December 18, 1981, in the United States District Court for the Northern District of Texas (the Texas Action, Complaint printed at App. D) against Santa Fe Industries, Inc. (SFI), The Atchison, Topeka and Santa Fe Railway Co. (AT&SF), Santa Fe Mining, Inc. (SFM), and others.[4] The Texas Complaint alleges that SFI, AT&SF, and SFM (together with their "co-conspirator" Hospah) violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and the New Mexico Antitrust Act, §§ 57-1-1 and 57-1-2 N.M.S.A. 1978, and committed fraud (App. D at 26a, 28a, 30a, 31a, 35a). Hospah is not named in the Texas Action and has not transacted business in Texas

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[3] Chaco has obtained necessary surface mining permits and water rights and otherwise prepared for mining the coal. R. Vol. I-211.

[4] TUC and Chaco also sued, in Texas, Thercol Energy Co. (Thercol) and Peabody Coal Company (Peabody), alleging that the "Santa Fe Defendants" had conspired with Thercol and Peabody to fix the price of and monopilize the supply of steam coal from the San Juan Basin area of New Mexico. TUC and Chaco also seek, in The Texas Action, damages from SFI, AT&SF and SFM measured by the payments made by Chaco to Thercol. App. D at 38a, 39a. None of the "Santa Fe Defendants" are parties to any agreement between Chaco or TUC and Thercol or Peabody. The agreements between Chaco and Thercol/Peabody contain choice of law provisions adopting New Mexico law, but contain no forum selection clause. Thercol and Peabody have moved to transfer the Texas Action to New Mexico under 28 U.S.C. § 1404(a), and have moved to dismiss the Texas Action for failure to join Hospah as an indispensable party. Those motions are pending.

(R. Vol. I-212). The principal relief sought in the Texas Action against SFI, AT&SF, and SFM is cancellation of the Coal Lease and Surety Agreement, and damages measured by

> payments to Co-conspirator Hospah under the terms of the Coal Lease contract between Plaintiff Chaco and Hospah and the Surety Agreement between Plaintiff Texas Utilities and Hospah.

App. D at 38a. In addition to seeking recovery of such damages, trebled, TUC and Chaco prayed in the Texas Action that the Court

> declare the Coal Lease contract dated April 15, 1977 as amended on February 12, 1981, between Plaintiff Chaco and Co-conspirator Hospah, [and] the Surety Agreement dated April 15, 1977, between Plaintiff Texas Utilities and Co-conspirator Hospah . . . . to be unlawful, null, void, and unenforceable.

App. D at 38a-39a. TUC and Chaco also seek injunctive relief against continued enforcement of the Coal Lease and Surety Agreement; no other contract exists between TUC or Chaco and SFI, AT&SF, SFM or Hospah (R. Vol. I-211).

Upon learning of the filing of the Texas Action in violation of the forum selection clause in the Coal Lease, Petitioners (Hospah, SFI, AT&SF, and SFM) filed suit against Chaco and TUC in the United States District Court for the District of New Mexico the morning of Monday, December 21, 1981. Jurisdiction in the District Court was grounded upon 15 U.S.C. § 4 and 28 U.S.C. §§ 2201, 1331, 1337 and 1391(b). Service of process in the New Mexico Action was effected upon TUC and Chaco the day of filing, December 21 (R. Vol. I-194, 196). Service of process in the Texas Action was not effected upon AT&SF and SFM until December 24, 1981, and upon SFI until December 28, 1981 (R. Vol. I-210). In the New Mexico Action, Petitioners sought a declaratory judgment that they had not violated the federal or New Mexico antitrust laws or committed fraud, and sought

specific performance, by injunctive relief, of the forum selection clause and damages for its breach (App. C). Petitioners also filed a Motion for Preliminary Injunction seeking to restrain TUC and Chaco from conducting the Texas litigation in violation of the forum selection clause. On January 8, 1982, the New Mexico Federal Court heard Petitioners' Motion for Preliminary Injunction. The Court found that the Texas Action was a judicial proceeding arising out of or relating to the Coal Lease and that the forum selection contract was binding upon TUC and Chaco, and granted the Preliminary Injunction by order entered January 11 (App. B).[5] By Opinion entered March 29, the Tenth Circuit reversed the New Mexico Preliminary Injunction, holding that the New Mexico District Court could not enforce the forum selection clause by injunction and that Petitioners' sole remedy for enforcement of the clause was by motion to dismiss for improper venue, or motion to transfer, in the Texas Action. Petitioners here seek review of the Tenth Circuit's decision.

On April 22, the Tenth Circuit stayed issuance of its mandate pursuant to F.R. App. P. 41(b).

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[5] After the granting of the New Mexico Preliminary Injunction and before the Tenth Circuit suspended it by Emergency Stay Order of February 8, TUC and Chaco filed an Answer and Counterclaim in the New Mexico Action. R. Vol. I-311. The Counterclaim sought exactly the same relief as was sought in the Texas Action. In addition, on January 29, 1982, TUC and Chaco filed a separate action in the New Mexico Federal Court again alleging the same violations by AT&SF, SFI, and SFM, also naming Hospah as a Defendant, and seeking the same relief as was sought in the Texas Action. The stated reason for filing this wholly separate New Mexico Action was "an effort to comply with the preliminary injunction, pending appeal, to insure their right of trial by jury, as well as all other rights, including their rights as plaintiffs in a civil action. . . ." The record contains nothing to suggest why the filing of TUC and Chaco's separate New Mexico Action was not a voluntary choice of New Mexico as the appropriate forum for resolution of this dispute. *Cf. M/S Bremen v. Zapata Off-shore Co.*, 407 U.S. 1, 20 (1972).

ARGUMENT

I. THE TENTH CIRCUIT OPINION, IN HOLDING THAT FORUM SELECTION CLAUSES MAY NOT BE ENFORCED BY INJUNCTION, DECIDES AN IMPORTANT QUESTION OF FEDERAL PROCEDURE IN A MANNER WHICH CONFLICTS WITH THE PRINCIPLES OF *M/S BREMEN v. ZAPATA OFF-SHORE CO.*, 407 U.S. 1 (1972).

The Tenth Circuit Opinion (App. A) substantially undermines enforceability of forum selection clauses in interstate contracts. The Tenth Circuit held:

> The existence of a venue selection clause does not impose an absolute duty nor does it endow a party with an absolute right to have every dispute between the parties litigated in the named forum. The applicability of the venue selection clause is an issue of fact in and of itself. We do not consider it vexatious for a party to raise this issue in a forum other than the one designated in the venue selection clause.

(App. A at 5a). The Tenth Circuit's Opinion invites parties to forum selection clauses to ignore them by winning a race to the courthouse, and to the wrong courthouse at that. The decision of the Circuit Court relegates forum selection clauses to an inferior status in the hierarchy of contractual rights, and denies a court of equity its traditional power to order specific performance of contracts. This dilution of the enforceability of forum selection clauses is contrary to the principles of *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), and decides an important question of federal procedure—the appropriate method of enforcing forum selection contracts—which should be addressed by this Court. *See, e.g., Van Dusen v. Barrack*, 376 U.S. 612 (1964).

A. *M/S Bremen* Mandates Enforcement of Reasonable Forum Selection Clauses in Federal Courts.

Chief Justice Burger, writing for the Court in *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), held that forum selection clauses "are prima facie valid and

should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." 407 U.S. at 11. *M/S Bremen*, which has been aptly described as adopting a "strongly hospitable attitude" towards choice of forum agreements,[6] should have ended the historical aversion of federal courts to forum selection clauses as "ousting" courts of jurisdiction. This Court, noting that enforcement of such clauses is the view "advanced by noted scholars and . . . adopted by the Restatement of the Conflict of Laws" (407 U.S. at 12), held that the elimination of uncertainty and great inconvenience by agreeing in advance upon an acceptable forum, particularly in a "far from routine" transaction, should be "given full effect" and enforced unless the party resisting the clause clearly shows that enforcement would be unreasonable or unjust, or that the clause is invalid for reasons such as fraud or overreaching.

M/S Bremen has been accepted by scholars and lower federal courts as requiring enforcement of forum selection clauses in interstate as well as international agreements. *See, generally*, J. Gilbert, *Choice of Forum Clauses in International and Interstate Contracts*, 65 Ky. Law J. 1 (1976); F. Juenger, *Supreme Court Validation of Forum-Selection Clauses*, 19 Wayne L.Rev. 49 (1972); *Republic Int'l Corp. v. Amco Eng'rs Inc.*, 516 F.2d 161 (9th Cir. 1975); *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220, 234 n. 24 (6th Cir. 1972); *Kline v. Kawai America Corp.*, 498 F.Supp. 868, 871 n. 1 (D. Minn. 1980); *Dick Proctor Imports, Inc. v. Sumitomo Corp. of America*, 486 F.Supp. 815 (E.D. Mo. 1980); *Wellmore Coal Corp. v. Gates Learjet Corp.*, 475 F.Supp. 1140 (W.D. Va. 1979); *Taylor v. Titan Midwest Const. Corp.*, 474 F. Supp. 145, 148 (N.D. Texas 1979); *Full-Sight Contact Lens Corp. v. Soft Lenses, Inc.*, 466 F.Supp. 71 (S.D. N.Y. 1978).

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[6] 15 Wright, Miller & Cooper, Federal Practice and Procedure, § 3803 at 16 (1976).

The Tenth Circuit Opinion holds that if suit is brought in violation of a forum selection clause, the clause may not be enforced by injunctive relief; rather, the parties sued in violation of the clause must move to dismiss for improper venue or move to transfer under 28 U.S.C. § 1404(a). The Tenth Circuit held:

> The fact that a venue selection clause is involved does not negate the requirements of Rule 12(b). Were it otherwise, a party to such a contract would be invading the province of the courts to decide issues of venue. Such an interpretation of the effect of a venue selection clause generated the initial dislike of the courts for such clauses. *See The Bremen v. Zapata-Off-Shore Co.*, 407 U.S. 1 (1972).

(App. A at 6a). The citation to *M/S Bremen* for the proposition that courts "dislike" venue selection clauses as invading the province of the courts to decide issues of venue is indicative of the Tenth Circuit's reluctance to give "full effect" to such clauses, and conflicts with this Court's statement in *M/S Bremen* that judicial dislike of forum selection contracts as "ousting" a court of jurisdiction "is hardly more than a vestigial legal fiction." 407 U.S. at 12. The Tenth Circuit, by requiring a party sued in violation of a forum selection clause to seek its enforcement solely by means of a motion to transfer or a 12(b) motion to dismiss, renders forum selection clauses less worthy of equitable enforcement than other agreements and contributes to the very uncertainty and serious inconvenience which forum selection clauses are designed to avoid. *See M/S Bremen*, 407 U.S. at 14.

B. Whether Forum Selection Clauses May Be Enforced By Injunction Is An Important Issue Of Federal Procedure Which Should Be Decided By This Court.

M/S Bremen and the lower federal court cases which have followed it were cases in which the issue of enforcement of the forum selection clause arose upon a motion

to dismiss for improper venue, or to transfer under 28 U.S.C. § 1404(a), sometimes coupled with review of an injunction by the nonchosen forum against conduct of litigation in the selected forum. *See M/S Bremen*, 407 U.S. at 7-8. But no court prior to the Tenth Circuit's Opinion here has held that a motion under Rule 12(b) or 28 U.S.C. § 1404(a) is the *exclusive* means of enforcing such a clause. If enforcement of such clauses, where suit is brought in a nondesignated forum in breach of the clause, is limited to a 12(b) or 28 U.S.C. § 1404(a) motion to dismiss or transfer, the party seeking enforcement of the clause faces the loss of substantial procedural safeguards and is denied access to the traditional specific performance powers of a court of equity. Whether the enforcement of such clauses should be so restricted is clearly an important federal procedural question which this Court should address.

1. ***A motion to dismiss for improper venue under Rule 12(b), or to transfer under 28 U.S.C. §§ 1404(a) or 1406(a), cannot be the only appropriate means for enforcing forum selection clauses.***

A dismissal under F.R.Civ.P. 12(b) is appropriate only when venue is "improper." The "propriety" of venue heretofore has been determined by the nature of the action and the residency or place of business of the plaintiffs and defendants, 28 U.S.C. § 1391, or by special statutes (such as the Clayton Act) which authorize the bringing of suit in a district where the defendant may be "found." 15 U.S.C. § 22. None of these statutes mentions forum selection clauses. Accordingly, if the residency-place of business requirements of the venue statutes are met, venue may be "proper" in the statutory sense even though suit is brought in the non-designated forum in violation of a forum selection clause. This Court did not hold in *M/S Bremen* that venue becomes "improper" under the venue statutes simply because the parties have contracted for a different venue. In those cases in which the

non-chosen court has determined to enforce the forum selection clause by dismissal or transfer, the issue has been resolved by application of the principles of *M/S Bremen*, without discussion of whether dismissal for "improper" venue, or transfer for "convenience," is the appropriate procedure.[7]

A transfer motion under 28 U.S.C. § 1404(a) or 1406(a) presents a similar procedural difficulty. A transfer under § 1404(a) may be ordered "for the convenience of parties and witnesses, in the interest of justice . . . ." The considerations which activate a court's discretion to transfer under § 1404(a) differ substantially from the rules governing enforcement of forum selection contracts

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[7] Litigants, and the lower federal courts which have dismissed or transferred actions brought in violation of forum selection clauses, have evidenced some doubt concerning the appropriate procedural vehicle. *St. Paul Fire and Marine Ins. Co. v. Travelers Indemnity Co.*, 401 F.Supp. 927 (D. Mass. 1975) dismissed the action for "lack of proper venue." Most often, the issue has been raised by a motion to dismiss under Rule 12(b)(3), coupled with a motion to transfer under either 28 U.S.C. § 1404(a), 28 U.S.C. § 1406(a), or both. *See, e.g., Taylor v. Titan Midwest Constr. Corp.*, 474 F.Supp. 145 (N.D. Texas 1979); *A. C. Miller Concrete Prod. Corp. v. Quikset Vault Sales Corp.*, 309 F.Supp. 1094 (E.D. Pa. 1970); *Full-Sight Contact Lens Corp. v. Soft Lenses, Inc.*, 466 F.Supp. 71 (S.D. N.Y. 1978); *Wellmore Coal Corp. v. Gates Learjet Corp.*, 475 F.Supp. 1140 (W.D. Va. 1979). In *Jack Winter, Inc. v. Koratron Co.*, 326 F.Supp. 121 (N.D. Cal. 1971), transfer motions under both 28 U.S.C. §§ 1404(a) and 1406(a) were coupled with a motion to dismiss for "lack of jurisdiction" under F.R.Civ.P. 12(b)(2). In *Plum Tree Inc. v. Stockment*, 488 F.2d 754 (3d Cir. 1973), and *Dick Proctor Imports, Inc. v. Sumitomo Corp.*, 486 F.Supp. 815 (E.D. Mo. 1980), the issue was raised by a § 1404(a) motion to transfer only. As we discuss in n.10, *infra*, whether the action is dismissed or transferred, and whether the transfer is under § 1404 or § 1406, may have substantial impact upon application of choice of law rules by the transferee court (or the court in the chosen forum if the nonchosen court dismisses). At least one court has expressed doubt whether enforcement of a forum selection clause should be by transfer under § 1404(a) or under § 1406(a). *A. C. Miller Concrete Prod. Corp. v. Quikset Vault Sales Corp.*, 309 F.Supp. at 1095.

adopted by this Court in *M/S Bremen*. A movant under § 1404(a) must carry the burden of establishing that a transfer should be made. But *M/S Bremen* clearly held that the party resisting enforcement of a forum selection clause bears the burden of showing that enforcement would be unreasonable or that the clause is invalid.[8] Furthermore, a transfer motion will be denied unless the balance of convenience militates strongly against the plaintiff's choice of forum, *Ellicott Mach. Corp. v. Modern Welding Co.*, 502 F.2d 178 (4th Cir. 1974). A forum selection clause, however, must be enforced unless the chosen forum "is so gravely difficult and inconvenient that [a party] will for all practical purposes be deprived of his day in court." *M/S Bremen*, 407 U.S. at 18. Likewise, 28 U.S.C. § 1406(a) applies, by its terms, only if an action has been filed "laying venue in the wrong division or district."

These problems in applying Rule 12(b) and the transfer statutes to the enforcement of forum selection clauses indicate that Congress could not have intended those procedures

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[8] "[I]t seems reasonably clear that the District Court and the Court of Appeals placed the burden on Unterweser to show that London would be a more convenient forum than Tampa, although the contract expressly resolved that issue. The correct approach would have been to enforce the forum clause specifically unless Zapata could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." 407 U.S. at 15. Moreover, if forum selection clauses may only be enforced by a transfer motion under § 1404(a), several cases have indicated that the clause itself will be treated as only "one factor" in determining whether a transfer should be granted. *Full-Sight Contact Lens v. Soft Lenses, Inc.*, 466 F.Supp. at 74; *Plum Tree, Inc. v. Stockment*, 488 F.2d 754 (3d Cir. 1973); *Cutter v. Scott & Fetzer Co.*, 510 F.Supp. 905 (E.D. Wis. 1981). Similarly, some cases have indicated that the "reasonableness" of the forum selection clause is to be tested by criteria applicable under § 1404(a), in addition to the factors mentioned in *M/S Bremen*. *See e.g., Leasewell, Ltd. v. Jake Shelton Ford, Inc.*, 423 F.Supp. 1011 (S.D. W.Va. 1976); *Kline v. Kawai America Corp.*, 498 F.Supp. 868 (D. Minn. 1980). Application of § 1404(a) criteria can only dilute the enforcement of forum selection clauses.

as the exclusive means of enforcing forum selection contracts. Indeed, the presence of all three provisions (Rule 12(b), 28 U.S.C. § 1404(a), and 28 U.S.C. § 1406(a)) renders highly suspect the Tenth Circuit's conclusion (App. A at 6a) that any particular method of challenging venue is exclusive.

The non-appealability of an order refusing to dismiss for improper venue or refusing to transfer also indicates that those procedures cannot be the exclusive means of enforcing forum selection contracts without subjecting parties relying upon such contracts to the loss of important procedural rights. Neither the denial of a motion to dismiss for improper venue under Rule 12(b), nor the denial of a motion to transfer, is appealable as of right. An adverse decision may not be reviewed until after final judgment, except by the extraordinary remedy of mandamus. *See Norwood v. Kirkpatrick*, 349 U.S. 29 (1955); *Plum Tree, Inc. v. Stockment*, 488 F.2d 754 (3d Cir. 1973); *Ellicott Mach. Corp. v. Modern Welding Co.*, 502 F.2d 178 (4th Cir. 1974). "Mandamus is a remedy long restricted . . . in the main to situations where ministerial duties of a non-discretionary nature are involved." *Panama Canal Co. v. Grace Lines, Inc.*, 356 U.S. 309, 318 (1958). By filing suit in the wrong forum, a party seeking to avoid a forum selection clause is rewarded, by the Tenth Circuit, with the following substantial procedural advantages gained through breach of contract: (1) enforcement of the clause may only be obtained through procedures (motion to dismiss for improper venue or to transfer) which are of questionable utility in resolving the issue; (2) an adverse decision may not be reviewed by appeal until after final judgment; and (3) the party seeking enforcement of the clause may have the burden of establishing that it should be enforced by dismissal or transfer. Whether forum selection clauses should be relegated to such dubious and unpredictable methods of enforcement,

and whether parties to such clauses should be encouraged to breach them, are procedural questions of serious import which this Court should decide.

Petitioners have already been subjected to the inconvenience and uncertainty sought to be avoided by the forum selection clause. Even if the Texas Federal Court should grant a motion to dismiss for improper venue, or transfer the Texas Action to New Mexico,[9] the uncertainty and inconvenience will not be eliminated.[10] Furthermore, even if the Texas Court should transfer that action to New Mexico, the Tenth Circuit's Opinion and its serious impact upon the enforceability of

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[9] To avoid any implication of a default, Petitioners filed in the Texas Action a Motion to Dismiss for Improper Venue and for failure to join Hospah as an indispensable party, but have suggested that briefing and decision of such motions be deferred pending action on this Petition. Petitioners have not filed a Motion to Transfer in the Texas Court.

[10] After transfer under 28 U.S.C. § 1404(a), the action in New Mexico will be conducted as if the trial court were sitting in Texas. *Van Dusen v. Barrack*, 376 U.S. 612 (1964). This would require the New Mexico federal district court to make numerous determinations as to Texas choice-of-law principles, *e.g.* whether under Texas choice-of-law rules, the fraud issues in this action are governed by Texas or New Mexico substantive law. *See* 15 Wright, Miller & Cooper, Federal Practice and Procedure § 3846. If transfer is ordered pursuant to 28 U.S.C. § 1406(a) because venue is wrong, the choice-of-law principles of New Mexico as the transferee state should apply. *Martin v. Stokes*, 623 F.2d 469 (6th Cir. 1980); *Ellis v. Great Southwestern Corp.*, 646 F.2d 1099 (5th Cir. 1981). If transfer is ordered pursuant to a § 1406(a) because Hospah, an indispensable party, is absent, assuming that transfer is permissible for that reason, it is unclear which jurisdiction's choice-of-law principles would apply. Moreover, if the motion to dismiss or to transfer should be granted, TUC and Chaco are certain to seek review of a decision to transfer by mandamus, or by appeal if the motion to dismiss is granted. All of this uncertainty and delay was avoided by the New Mexico District Court specifically enforcing the forum selection agreement of the parties.

forum selection clauses will remain uncorrected, and can only create further confusion and uncertainty as parties seek to enforce—or avoid—forum selection clauses in future controversies.[11]

2. *Specific Performance by Injunction is an Appropriate Method of Enforcement of Forum Selection Clauses; the Tenth Circuit's Holding to the Contrary Conflicts with the Principles of* M/S Bremen.

The Tenth Circuit's holding results from an erroneous application of the discarded "first-filed" rule, discussed in Point II, and from a failure to follow the principles mandating enforcement of such clauses adopted in *M/S Bremen*, 407 U.S. 1, and reaffirmed in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974). This Court has clearly held that such clauses "should be enforced," 407 U.S. at 10, that they "should be given full effect," 407 U.S. at 13, and that the "correct approach" is "to enforce the forum clause specifically" unless enforcement is clearly shown to be unreasonable or unjust, or the clause invalid for fraud or overreaching. 407 U.S. at 15. *Scherk v. Alberto-Culver* held that a similar clause, requiring arbitration, must be "respected and enforced by the federal courts." 417 U.S. at 519-20. The decision below, by denying application of the equitable remedy of specific performance and relegating enforcement to the uncertain remedies of dismissal for "improper" venue, or transfer for "convenience," with a loss of important procedural

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[11] The number of recent cases involving forum selection contracts cited at page 8, *supra*, demonstrates the growing importance of such agreements in interstate as well as international commerce. Parties negotiating substantial contracts, and their counsel, will increasingly include choice of forum—and choice of law—provisions as essential terms of the contract: "Viewed realistically, choice of law and choice of forum are but two more terms on which agreement must be reached." F. Juenger, *Supreme Court Validation of Forum-Selection Clauses*, 50 Wayne L. Rev. 49, 50 (1972).

safeguards, places such clauses in an inferior status and directly contradicts the teachings of *M/S Bremen* and *Scherk*. The decision will encourage needless litigation, by rewarding with unwarranted procedural benefits those who seek to avoid such clauses by filing suit in breach thereof, and by warning parties who would insist upon performance of such clauses that suit in the designated forum must be filed at the slightest hint of disagreement. This Court should again affirm the validity of such clauses, and should confirm the power of a federal court to utilize equitable remedies for their enforcement.

A forum selection clause, as much as any other contract, should be entitled to specific enforcement. Indeed, this Court in *M/S Bremen* held that the "threshold question" was whether the court below (in which suit had been filed in violation of the clause) should have exercised its jurisdiction "to do more than give effect to the legitimate expectations of the parties . . . by *specifically enforcing* the forum clause." 407 U.S. at 12. (Emphasis added.) Both *M/S Bremen* and *Scherk* involved clauses designating a foreign tribunal; accordingly, the Court there had no occasion to consider whether the designated folum may specifically enforce the clause by injunction. *Cf. Scherk*, 417 U.S. at 517. Neither precedent nor policy suggests why such clauses should not be enforced by injunction. Commentators have suggested that such enforcement is appropriate. *See* J. Gilbert, *Choice of Forum Clauses in International and Interstate Contracts*, 65 Ky. L.J. 1, 19 (1976). This Court has recognized the analogy between forum selection and arbitration clauses, and has given clear directions that they are to be enforced. *Scherk v. Alberto-Culver Co.*, 417 U.S. at 519, 520.[12]

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[12] An order directing an arbitration to proceed is in effect a bill for specific performance, "in which case the equity powers of the court are generally broad enough to supplement any deficiencies of the Arbitration Act." 16 W. Jaeger, Williston on Contracts § 1923, p. 596 ed. 1976). *See also* 5A. A. Corbin, Corbin on Contracts,

The District Court considered the various defenses to application and enforcement of the forum selection clause urged by TUC and Chaco, including contentions that the forum selection clause should not be enforced because TUC and Chaco alleged fraud;[13] that the clause was inapplicable because Hospah, the party on the "Santa Fe" side which signed the Coal Lease and Surety Agreement, was not a party to the Texas Action;[14] the contention

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§ 1173, at 272-73 (1951). *See also The Anaconda v. American Sugar Refining Co.*, 322 U.S. 42 (1944); *Albatross S.S. Co. v. Manning Bros.*, 95 F.Supp. 459 (S.D. N.Y. 1951). In *Bartell Media Corp. v. Fawcett Printing Corp.*, 342 F.Supp. 196 (S.D. N.Y. 1972), the Court granted an order compelling arbitration notwithstanding the pendency of a prior action between the parties in another federal district court. The Court declined to enjoin the parties from proceeding with the other action, noting that § 3 of the Arbitration Act (9 U.S.C. § 3) requires "the court in which such suit is pending" to stay trial until arbitration has been had. Here, no statute directs the method of enforcing forum selection clauses, and Congress has not acted either to foreclose specific enforcement of forum selection contracts by injunction or to require the non-chosen forum to honor such contracts.

[13] This Court has squarely held that the mere allegation that an entire contract was induced by fraud is insufficient to avoid the choice of forum provision. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 n. (1974). *See also Republic Int'l Corp. v. Amco Eng'rs, Inc.*, 516 F.2d 161, 168 (9th Cir. 1975); *A. C. Miller Concrete Products Corp. v. Quikset Vault Sales Corp.*, 309 F.Supp. 1094, 1095 n.2 (E.D.Pa. 1970). TUC and Chaco have not alleged that the forum selection clause itself was induced by fraud.

[14] Hospah, as the party which signed the Coal Lease and Surety Agreement, would seem to be an indispensable party to the Texas Action, as found by the District Court (App. C at 16a). *See Central R. Co. v. Mills*, 113 U.S. 249 (1885); *Tewa Tesuque v. Morton*, 498 F.2d 240 (10th Cir. 1974); *Lomayaktewa v. Hathaway*, 520 F.2d 1324 (9th Cir. 1975). At least this would appear to be true where TUC and Chaco did not allege in the Texas Action any basis for ignoring the separate corporate existence of Hospah, and dealt with Hospah as a separate corporation. R. Vol I-213. *See* 6 Cavitch, *Business Organization* § 120.05[2][b] (1981); *Bendix Home Systems, Inc. v. Hurston Enterprises*, 566 F.2d 1039 (5th Cir. 1978); *Palatine Ins. Co. v. Santa Fe Mercantile Co.*, 13 N.M.

that the forum selection clause was not binding on TUC as it had not signed the Coal Lease;[15] and that enforcement of the forum selection clause would contravene the public policy according Plaintiffs a wide choice of forum in antitrust cases.[16] The Trial Judge properly exercised his discretion in holding that these contentions were insufficient to allow Chaco and TUC to escape the consequences of their agreement, that the Texas Action constituted a "judicial proceeding arising out of or relating to" the Coal Lease, and that the Surety Agreement, by incorporating the Coal Lease by reference, also bound TUC to the forum selection provisions of the Lease.

241, 82 P. 363 (1905); Powell, *Parent and Subsidiary Corporations*, 83 (1931).

[15] See note 2 *supra*. The Surety Agreement assures the performance of and incorporates the basic Coal Lease, and the District Court did not abuse its discretion in holding that TUC is bound by the provisions of the Coal Lease. *See American Cas. Co. v. Brezina Const. Co.*, 295 F.2d 603, 607 n.7 (8th Cir. 1961); *Massachusetts Bonding & Ins. Co. v. Feutz*, 182 F.2d 752, 757 (8th Cir. 1950). *See also Brown v. Gingiss Int'l, Inc.*, 360 F.Supp. 1042 (E.D. Wisc. 1973).

[16] Similar choice of forum provisions have been held applicable to antitrust claims in *Full-Sight Contact Lens Corp. v. Soft Lenses, Inc.*, 466 F.Supp. 71 (S.D. N.Y. 1978); *A. C. Miller Concrete Products Corp. v. Quikset Vault Sales Corp.*, 309 F.Supp. 1094 (E.D. Pa. 1970); and *Jack Winter, Inc. v. Koratron Co., Inc.*, 326 F.Supp. 121 (N.D. Cal. 1971). TUC and Chaco also argued that the forum selection clause is void as contrary to the broad venue provisions of Section 12 of the Clayton Act, relying upon *Boyd v. Grand Trunk Western R. Co.*, 338 U.S. 263 (1949), *Wilko v. Swan*, 346 U.S. 427 (1953), and *Aacon Auto Transp., Inc. v. State Farm Mut. Auto Ins. Co.*, 537 F.2d 648 (2d Cir. 1976), *cert. denied*, 429 U.S. 1042 (1977). But the Clayton Act contains no provision similar to those considered in *Boyd*, *Wilko*, and *Aacon Auto Transp.*, declaring void any contractual provision or "stipulation" waiving any provision of the applicable statute. *Cf. Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 515 (1974); *see also*, J. Gilbert, *Choice of Forum Clauses in International and Interstate Contracts*, 65 Ky. L. J. 1, 40-42 (1976). The precise "public policy" argument advanced by TUC and Chaco was rejected in *Full-Sight Contact Lens Corp. v. Soft Lenses, Inc., supra*, 466 F.Supp. at 73.

The Tenth Circuit did not set aside, or even mention, the District Court's findings on any of these issues,[17] but held that applicability and enforcement of the clause was itself an "issue of fact" (App. A at 5a) to be decided by the Court in the Texas Action. *See also* App. A at 5a, n.2. But the teachings of *M/S Bremen* must grant the New Mexico District Court discretion to determine applicability of the forum selection contract. This Court has repeatedly held that "a trial judge's determination of a preliminary injunction should be reversed by this Court or by other appellate courts in the federal system only when the judge's 'discretion was improvidently exercised.' " *Synanon Foundation, Inc. v. California*, 444 U.S. 307 (1979) (Rehnquist, J., in chambers); *Alabama v. United States*, 279 U.S. 229, 231 (1929). The law in the Tenth Circuit prior to the present opinion apparently adhered to that principle. *See Lundgrin v. Claytor*, 619 F.2d 61, 63 (10th Cir. 1980); *Continental Oil Co. v. Frontier Refining Co.*, 388 F.2d 780, 781 (10th Cir. 1964). But one of the most startling aspects of the Tenth Circuit's Opinion here is that it totally ignored the basic obligation of the District Court to exercise its discretion in granting or denying equitable relief. Nowhere in the Tenth Circuit Opinion did the Court even consider the findings of the Trial Court, much less the propriety of the exercise of its discretion.

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[17] The facts necessary to the Trial Court's findings were established by the pleadings, the agreements attached as exhibits, and the affidavit of D. J. Walsh (R. Vol. I-209). Petitioners have reproduced the complaint in the Texas Action as App. D, 18a-40a. TUC and Chaco offered no opposing affidavits or testimony. "When a question of the district court's jurisdiction is raised either by a party or by the court on its own motion, the court may inquire by affidavits or otherwise into the facts as they exist. As stated in *Cribbs v. Berck, supra*, 307 U.S. at 71, 72, 'As there is no statutory direction for procedure upon an issue of jurisdiction, the mode of determination is left to the trial court.' " *Land v. Dollar*, 330 U.S. 731, 736 n.4 (1947). The District Court also found that Petitioners had satisfied the traditional four-part test for grant of a preliminary injunction (App. C at 15a-17a). Again, the Tenth Circuit did not mention these findings, nor did it hold that they were clearly erroneous.

Courts of equity have long been recognized as possessing the powers to enforce contracts by injunctive decrees and to enjoin parties from proceeding with litigation in another court.[18] That remedy ought not be denied simply because the contractual right sought to be enforced arises from a forum selection clause, especially where denial of injunctive relief will create the very uncertainty, inconvenience, and delay which the clause was designed to avoid. The objection that such a decree interferes with the jurisdiction of the Texas court (App. A at 6a) was disposed of long ago by Justice Cardozo; such a decree acts upon the parties alone, and is not "tantamount to . . . restraint of the court itself." *Steelman v. All Continent Corp.*, 301 U.S. 278, 290-91 (1937). Unless forum selection clauses are to occupy a status inferior to other contractual rights, this Court should decide the issue of whether such clauses may be specifically enforced by injunctive relief and the Tenth Circuit's misapplication of *M/S Bremen* should be corrected.

II. THE OPINION BELOW, IN HOLDING THAT THE FEDERAL COURT IN THE "FIRST-FILED" ACTION MUST ALWAYS DETERMINE WHETHER VENUE IS APPROPRIATE, AND THAT A FEDERAL COURT IN THE "SECOND" ACTION MAY NOT ENJOIN THE PARTIES FROM FURTHER CONDUCTING THE FIRST ACTION, DECIDES AN IMPORTANT QUESTION OF FEDERAL PROCEDURE IN A MANNER WHICH CONFLICTS WITH DECISIONS OF THIS COURT AND OF OTHER CIRCUITS.

The Texas Action was filed December 18; the New Mexico Action was filed December 21. Service was

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[18] *See* 4 Pomeroy's Equity Jurisprudence § 1361(b) (5th ed. 1941); 11 W. Jaeger, Williston on Contracts §§ 1418, 1445 (3d ed. 1976); Annot., 42 A.L.R. Fed. 592 (1979) and cases cited in Point II, *infra*; Annot., 6 A.L.R.2d 896 (1949); Note, 10 La. L.Rev. 302 (1950). The Court of Appeals apparently denies the existence of this power if the "foreign" action was filed first, regardless of the presence of the forum selection clause, equitable considerations, and the balance of convenience. *See* Point II, *infra*.

effected first in the New Mexico Action. The Tenth Circuit, adhering to an outmoded "first-filed" rule determining priority between courts of concurrent jurisdiction, held that the Court in the first-filed action must always determine whether venue is appropriate, and that injunctive relief against the parties conducting another action may only be employed where the other action is "vexatious and oppressive." The Tenth Circuit went on to hold that Petitioners could not file an action seeking a declaratory judgment and enforcement of the forum selection clause "as a substitute for the Rules of Civil Procedure in response to a pending lawsuit." App. A at 8a. This mechanical, rigid application of the outmoded "first-filed" rule squarely conflicts with decisions of this Court as well as those of several other circuits. Even apart from the mischief wrought by the Tenth Circuit's derogation of forum selection contracts, such adherence by a Court of Appeals to the discarded and discredited "first-filed" rule calls for immediate correction by this Court.

A. Priority Between Pending Federal Actions Involving the Same or Similar Parties and Issues is an Important and Recurring Federal Procedural Question.

This Court recognized in *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180 (1952) that "the Federal Declaratory Judgments Act, facilitating as it does the initiation of litigation by different parties to many-sided transactions, has created complicated problems for coordinate courts." 342 U.S. at 183. The Court there granted certiorari in a similar situation in recognition that the question presented was one "of importance to the conduct of multiple litigation in the federal judicial system." *Id.* *See also Van Dusen v. Barrack*, 376 U.S. 512 (1964); *Land v. Dollar*, 330 U.S. 731 (1947); *Landis v. North American Co.*, 299 U.S. 248 (1936).

B. The Tenth Circuit Decision Conflicts With *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.* and in Principle With *Colorado River Water Conservation Dist. v. United States.*

In *Kerotest* the "first" action was commenced in a federal court in Illinois against a distributor of fire extinguishers. Kerotest, the manufacturer of the allegedly infringing device, was not joined as a defendant. Thereafter, in the "second" action, Kerotest filed suit in the federal court in Delaware for a declaratory judgment that the patents sued on in the Illinois action were invalid and that Kerotest's devices did not infringe C-O-Two's patents. C-O-Two then joined Kerotest, the manufacturer, in the Illinois action. Accordingly, the "first" case—in Illinois—was not commenced as against the manufacturer, Kerotest, until *after* the Delaware action was filed. The Delaware Court, applying the "first-filed" rule, enjoined C-O-Two from proceeding in the Illinois action and denied a stay of the Delaware suit.

The Third Circuit reversed, holding that the distributor, Acme, could not be made a party to the Delaware suit, that "the whole of the war and all the parties to it are in the Chicago theatre," and that the Illinois suit should be allowed to proceed as its result would "bind all the parties in both cases." This Court affirmed, holding:

> Wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation, does not counsel rigid, mechanical solution of such problems. The factors relevant to wise administration here are equitable in nature. Necessarily, an ample degree of discretion, appropriate for disciplined and experienced judges, must be left to the lower courts.

342 U.S. at 183-84.[19] The Tenth Circuit decision here

[19] This Court declined in *Kerotest* even to discuss the so-called "first-filed" rule: "Other cases in Courts of Appeals which present at all comparable situation do not show any rigid rule such as that

refused even to consider the various equitable factors applied by the District Court in reaching its conclusion that the Texas Action should be enjoined, and resolved the issue by following the same "rigid, mechanical solution" rejected by this Court in *Kerotest*.

In *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1975), *reh. denied*, 426 U.S. 912 (1976), this Court again discussed the problems arising from "the contemporaneous exercise of concurrent jurisdiction . . . by federal courts" and reaffirmed that such conflicts cannot be resolved by any rigid first-filed rule, again rejecting a mechanical solution to "priority" problems between federal district courts: "As between federal district courts, however, *though no precise rule has evolved*, the general principle is to avoid duplicative litigation." *Id.* at 817. (Emphasis added.)

The Opinion below is squarely in conflict with *Kerotest* and conflicts with the principles of *Colorado River*. Returning to a "rigid, mechanical solution" of these problems would have many adverse consequences. District courts would no longer have the discretion accorded to them by *Kerotest* to determine and apply equitable factors. Apparently, no court will ever be permitted to enjoin the parties from proceeding in an earlier-filed action unless the first suit is deemed "vexatious and oppressive"—a test which the Tenth Circuit failed to define in its Opinion.[20] Such a test—that the "first-filed" rule

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under which the District Court felt constrained. In view of the basis of our decision it would not be profitable to discuss these cases in detail." 342 U.S. at 184 n.3.

[20] Whatever "vexatious" means, *cf. Steelman v. All Continent Corp.*, 301 U.S. 278 (1937), according to the Tenth Circuit it does not include the filing of suit in breach of a forum selection clause. *See* App. A at 5a. Even if the Tenth Circuit were correct in holding that the "first-filed" rule governs except where the earlier suit is "vexatious or oppressive," surely the District Court must be granted some discretion in determining whether the earlier action

must govern absent a finding that the earlier action is "vexatious or oppressive," apparently to be made as a matter of law by the Circuit Court—clearly violates the *Kerotest* rule, which requires solution of such problems by application, in the trial court's discretion, of equitable considerations and the balance of convenience. The opinion of the Circuit Court exhumes an anachronistic rule. If allowed to stand, the opinion can only create confusion and lead to an unwarranted expenditure of the resources of courts and parties in attempting to solve "complicated problems for coordinate courts" resulting from the "initiation of litigation by different parties to many-sided transactions." *Kerotest*, 342 U.S. at 183.

C. The Tenth Circuit's Opinion Conflicts With Decisions of the District of Columbia, Second, and Sixth Circuit Courts of Appeal.

In *Columbia Plaza Corp. v. Security Nat'l Bank*, 525 F.2d 620 (D.C. Cir. 1975), cited with approval in *Colorado River Conservation Dist. v. United States*, 424 U.S. at 817, the District of Columbia Circuit held:

> In our view, however, choice of the forum cannot be suitably made by mechanical application of that ["first-filed"] principle. The opinions recognizing the rule have frequently contained a caveat that it should be ignored under some circumstances, and in a good many cases proceedings in an earlier-filed action have been stayed to enable the court later acquiring jurisdiction to proceed to judgment first. We do not regard an injunction favoring the first-filed action as a mandatory step in all instances because countervailing equitable considerations, where present, cannot be ignored.

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in fact was "vexatious." Here, the District Court specifically found that the Texas Action, filed in outright breach of the forum selection clause, was "vexatious." App. C at 15a.

525 F.2d at 627. In *Columbia Plaza*, the Court ordered the district court to enjoin an action pending in the federal court in New York, not by application of a "first to file" rule, but rather by applying equitable considerations. In *William Gluckin & Co. v. Int'l Playtex Corp.*, 407 F.2d 177 (2d Cir. 1969), the Second Circuit affirmed the grant of an injunction by the "second" court against the parties conducting the "first" action, holding that the first action would not be given priority if the balance of convenience or "special circumstances" favored the second action. The Second Circuit followed *William Gluckin* in *Factors, Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215, 218 (2d Cir. 1978). In *Wheeling-Pittsburgh Steel Corp. v. Donovan Wire & Iron Co.*, 416 F.Supp. 602 (N.D. Ohio 1976), the Sixth Circuit affirmed without opinion, 577 F.2d 744 (1978), an injunction granted by the "second" court against further proceedings in the "first" action.

The Tenth Circuit's Opinion below clearly conflicts with these holdings of the other Circuit Courts. The Tenth Circuit recognized as much by stating that it agreed with the holdings of *Columbia Plaza* and *William Gluckin* "to the extent" that *Kerotest* does not mean that the court in the first-filed action should always decide the merits.[21] But the Tenth Circuit erroneously cited *Kerotest* as supporting its conclusion that the Court in the first-filed action should always determine whether venue is appropriate, unless the first suit is "vexatious or oppressive." *Columbia Plaza*, *William Gluckin*, and *Factors, Etc., Inc.* clearly do not adopt such a rule. As required by *Kerotest*, the District of Columbia, Second, and

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[21] App. A at 7a. The very language of *Kerotest* quoted by the Tenth Circuit in support of its position in fact recognizes that an injunction by the "second" court against conduct of the "first" action may be appropriate in some circumstances. "If he [the manufacturer] is anticipated [in filing suit], the court's discretion is broad enough to protect him from harrassment of his customers." 342 U.S. at 186.

Sixth Circuits allow the district court, even in the "second" action, to determine if equitable considerations and the balance of convenience outweigh the plaintiff's choice of forum in the "first-filed" action. If so, an injunction by the court in the "second" action against further conduct of the "first" action is appropriate.[22]

Although not involving injunctions entered by the "second" court against further conduct of the "first" suit, other decisions of circuit courts have recognized that *Kerotest* discarded the "first-filed" rule. These cases have held that priority between pending federal actions is to be determined by equitable considerations and the balance of convenience. Accordingly, those decisions also conflict with the Opinion below. *See Small v. Wageman*, 291 F.2d 734 (1st Cir. 1961); *Del Mar Avionics v. Quinton Instruments Co.*, 645 F.2d 832, 836 (9th Cir. 1981). In *American Civil Liberties Union v. Laird*, 463 F.2d 499, 501 n.2 (7th Cir. 1972), the Seventh Circuit held that application of the doctrine of comity "may or may not

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[22] In addition to *William Gluckin* and *Wheeling-Pittsburgh Steel*, other cases in which the "second" court has enjoined further proceedings in the "first" action include *Sybil Ives, Inc. v. Helene Curtis Indus., Inc.*, 249 F.Supp. 865 (S.D. N.Y. 1965); *Delamere Co. v. Taylor-Bell Co.*, 199 F.Supp. 55 S.D. N.Y. 1961); *Sentry Corp. v. Conal Int'l Corp.*, 164 F.Supp. 770 (S.D. N.Y. 1953); and *Columbia Pictures, Inc. v. Schneider*, 435 F.Supp. 742 (S.D. N.Y. 1977). In the Circuit Court, TUC and Chaco sought to dismiss these cases as involving a supposedly "rare and extraordinary" exception to the "first-filed" rule which TUC and Chaco described as the "customer suit exception." But the policy which supports the grant of an injunction against the further conduct of an earlier action in patent litigation in which the manufacturer is not joined would seem to be identical, or at least very similar, to the policy followed by the District Court here in enjoining TUC and Chaco from conducting further litigation in violation of their forum selection contract, especially where Hospah, the corporation which signed the very Coal Lease and Surety Agreement TUC and Chaco seek to have cancelled in the Texas Action, is not present before the Texas Court.

result in deferral to the jurisdiction of first filing, depending on the facts of the case." Numerous district court decisions, including courts in the Tenth Circuit,[23] have applied the modern "equitable considerations—balance of convenience" test in resolving priorities as opposed to mechanical application of the "first-filed" rule.[24]

The New Mexico District Court found that compelling equitable considerations and the balance of convenience gave priority to the New Mexico Action and required that the forum selection clause be specifically enforced. The factors considered by the District Court included the strong "equitable considerations" of the forum selection clause.[25] Factors affecting the "balance of convenience" and strongly pointing to New Mexico as the appropriate forum included the fact that jurisdiction over the parties was acquired first in the New Mexico Action.[26] The District Court also considered the absence of Hospah in the Texas Action, and the fact that Hospah could not be joined, which raised serious questions concerning delay in resolution of the Texas Action and the ultimate effec-

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[23] *See Private Medical Care Foundation, Inc. v. Califano*, 451 F.Supp. 450 (W.D. Okla. 1977); *Pullman, Inc. v. W. R. Grace & Co.*, 437 F.Supp. 1062 (W.D. Okla. 1976); *Adolph Coors Co. v. Davenport Mach. & Foundry Co.*, 89 F.R.D. 148, 153 (D. Colo. 1981) ("the sequence of filing is not dispositive; other equitable considerations enter into the determination.").

[24] *See* cases cited at page 26, *supra*. *See also Polaroid Corp. v. Casselman*, 213 F.Supp. 379 (S.D. N.Y. 1962); *Kline v. Kawai America Corp.*, 498 F.Supp. 868 (D. Minn. 1980); *Wellmore Coal Corp. v. Gates Learjet Corp.*, 475 F.Supp. 1140 (W.D. Va. 1979); *A. C. Miller Concrete Products Corp. v. Quikset Vault Sales Corp.*, 309 F.Supp. 1094 (E.D. Pa. 1970).

[25] *See Adolph Coors Co. v. Davenport Mach. & Foundry Co.*, 89 F.R.D. at 150-51; *Lawn v. Franklin*, 328 F.Supp. 791 (S.D. N.Y. 1971).

[26] *See Polaroid Corp. v. Casselman*, 213 F.Supp. 379.

[27] "Since all the parties necessary to a complete determination are before this Court and jurisdiction over some of them has not or cannot be obtained in the [other] suit, to stay [this] suit would

tiveness of a judgment rendered there.[27] The Court noted that New Mexico is the principal place of business of Hospah, SFM, and Chaco, and that the location of the mapority of the witnesses and records relevant to the controversy pointed to New Mexico as the more convenient forum in any event.[28] Furthermore, New Mexico law must be applied to non-federal issues in the litigation, as admitted by TUC and Chaco.[29] The District Court also found that institution of the Texas Action by TUC and Chaco in the face of the forum selection clause constituted "forum shopping," another circumstance which has been held to justify refusal to honor the plaintiff's choice of forum in the "first" action.[30]

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result in multiplicity of suits wasteful to the litigants as well as the Court." *Sentry Corp. v. Conal Int'l Corp.*, 164 F.Supp. at 774. *See also Columbia Plaza Corp. v. Security Nat'l Bank*, 525 F.2d at 627; *Small v. Wageman*, 291 F.2d at 736; *Private Medical Care Foundation, Inc. v. Califano*, 451 F.Supp. at 451; *Adolph Coors Co. v. Davenport Mach. & Foundry Co.*, 89 F.R.D. at 153-54.

[28] See affidavit of D. J. Walsh, R. Vol. I-209.

[29] TUC and Chaco charge SFI, AT&SF, and SFM with violations of the New Mexico antitrust laws in the Complaint in the Texas Action. *See* App. D at 30a, 31a. This constitutes an admission either that the allegedly anticompetitive conduct occurred in New Mexico, or that the "choice of law" provision of the Coal Lease is binding. New Mexico would appear to be the appropriate forum in either event. Moreover, numerous cases have recognized that equitable considerations and judicial convenience favor conducting the litigation in a court of the state whose law must be applied. *Kline v. Kawai America Corp.*, 498 F.Supp. at 872; *Full-Sight Contact Lens v. Soft Lenses, Inc.*, 466 F.Supp. at 73; *Central Contracting Co. v. Maryland Cas. Co.*, 367 F.2d at 345; *Wellmore Coal Corp. v. Gates Learjet Corp.*, 475 F.Supp. at 1143-44; *A. C. Miller Concrete Products Corp. v. Quikset Vault Sales Corp.*, 309 F.Supp. at 1095.

[30] *See Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197 (2d Cir. 1970); *Helene Curtis Industries v. Sales Affiliates, Inc.*, 199 F.2d 73 (2d Cir. 1952); *Polaroid Corp. v. Casselman*, 213 F.Supp. at 383; *Rayco Mfg. Co. v. Chicopee Mfg. Corp.*, 148 F.Supp. 588 (S.D. N.Y. 1957).

The Circuit Court also held that Petitioners had somehow misused the Federal Declaratory Judgment Act "as a substitute for the

The District Court properly determined that the New Mexico action should be given priority by application of the modern "equitable considerations-balance of convenience" test mandated by *Kerotest*. Once the "priority" determination was made, the New Mexico Court acted properly in enjoining the parties from proceeding with the other litigation in exercise of the equity court's ancient power to enjoin multiplicity of suits and to conserve judicial resources. *Roth v. Bank of the Commonwealth*, 583 F.2d 527, 538 (6th Cir. 1978), *cert. dismissed*, 442 U.S. 925 (1979); *Columbia Plaza Corp. v. Security Nat'l Bank*, *supra*, 525 F.2d at 629; *Sperry-Rand Corp. v. Rothlein*, 288 F.2d 245, 249 (2d Cir. 1961).

The Tenth Circuit did not question any of the Trial Courts' findings, see page 19, *supra*, but simply resolved the problem by rigid application of a mechanical test long ago discarded by this Court. This Court should act now to reaffirm the principles adopted in *Kerotest*.

Rules of Civil Procedure in response to a pending lawsuit." App. A at 8a. This statement ignores Count III of the New Mexico Complaint, which sought specific performance of the forum selection clause and damages for its breach. In any event, the federal declaratory judgment counts are clearly proper. *Public Serv. Comm. of Utah v. Wycoff Co.*, 344 U.S. 237 (1952); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959); *Hanes Corp. v. Millard*, 531 F.2d 585 (D.C. Cir. 1976). Several cases which involved injunctions against the parties proceeding in another court (whether the "first" or "second" filed) were declaratory judgment actions. *See generally* Annot. 42 A.L.R. Fed. at 592; *Sybil Ives, Inc. v. Helene Curtis Industries, Inc.*, 249 F.Supp. 865; *Delamere Co., Inc. v. Taylor-Bell Co.*, 199 F.Supp. 55 (S.D. N.Y. 1961). The Tenth Circuit relied on cases holding that a federal declaratory judgment action may not be used to "take over" jurisdiction in an action properly pending in state court (App. A at 8a, n.4), apparently in the belief that "the underlying principles are equally applicable to comity between the federal courts." This Court in *Colorado River Water Conservation Dist. v. United States*, however, noted an important difference in the approach between state-federal concurrent jurisdiction and wholly federal concurrent jurisdiction. 424 U.S. at 818.

CONCLUSION

For the foregoing reasons, Petitioners respectfully pray that a writ of certiorari should issue to review the Judgment and Opinion of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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April 27, 1982

Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 82-1149

HOSPAH COAL COMPANY, a Delaware corporation, SANTA FE INDUSTRIES, INC., a Delaware corporation, THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a Delaware corporation, and SANTA FE MINING, INC., a Kansas corporation,

Plaintiffs-Appellees,

v.

CHACO ENERGY COMPANY, a New Mexico corporation, and TEXAS UTILITIES COMPANY, a Texas corporation,

Defendants-Appellants.

[Filed Mar. 29, 1982]

Appeal From the United States District Court
For the District of New Mexico

(D.C. No. CIV 81-1042 JB)

John R. Cooney of Modrall Sperling Roehl Harris & Sisk, Albuquerque, New Mexico (Gus Svolos, Chicago, Illinois, and Allen C. Dewey, Peter J. Adang, and John S. Thal of Modrall Sperling Roehl Harris & Sisk, with him on the brief), for Plaintiffs-Appellees.

Gordon B. Spivack of Lord, Day & Lord, New York, (M. D. Sample, Richard L. Adams, and Max E. Freeman

II of Worsham, Forsythe & Sample, Dallas, Texas, John N. McBaine, Jonathan M. Jacobson, Jonathan E. Clune, and Elinor R. Hoffman of Lord, Day & Lord, New York, New York, James C. Ritchie and Rex Throckmorton of Rodey, Dickason, Sloan, Akin & Robb, P.A., Albuquerque, New Mexico, and Walter A. Steele of White and Steele, P.C., Denver, Colorado, with him on the briefs) for Defendants-Appellants.

Before BARRETT, DOYLE and McKAY, Circuit Judges.

BARRETT, Circuit Judge.

This is an appeal from a grant of a preliminary injunction by the United States District Court for the District of New Mexico. The pertinent facts follow:

On December 18, 1981 Chaco Energy Company (Chaco) and Texas Utilities Company (TUC), defendants-appellants herein, filed suit in the United States District Court for the Northern District of Texas naming as defendants, among others with whom we are not now concerned, Santa Fe Industries, Inc. (SFI), the Atchison, Topeka and Santa Fe Railway Co. (SFR) and Santa Fe Mining, Inc. (SFM). The complaint in the Texas action alleged a conspiracy on the part of SFI, SFR, SFM and others amounting to a violation of the federal and New Mexico antitrust laws. The complaint further alleged common law fraud in the inducement and sought declaratory judgment, rescission of contracts, treble damages and injunctive relief.

Three days later, on December 21, 1981, SFI, SFR, SFM and Hospah Coal Company, a non-party defendant, co-conspirator in the Texas action, filed a declaratory judgment action in the United States District Court for the District of New Mexico, naming TUC and Chaco as defendants.

The complaint in the New Mexico action requested a declaration that the plaintiffs had not violated the antitrust laws and it sought an injunction against TUC and Chaco to prohibit them from proceeding with the Texas action. The basis for the requested preliminary injunction was a venue selection clause in a certain coal lease placing venue in New Mexico for all suits "arising out of or relating to" the coal lease.[1] The coal lease was signed by Hospah Coal Company and Chaco. A surety agreement between TUC and Hospah purportedly adopted the venue selection clause of the coal lease. It should be noted that Hospah Coal Company, SFM and SFR are all subsidiaries of SFI. Chaco is a subsidiary of TUC.

Service of process was accomplished in the New Mexico action prior to service in the Texas action. In response to the filing of the New Mexico action, TUC and Chaco sought a temporary restraining order against SFM, SFR, SFI and Hospah in the Texas district court. The Texas court declined to issue the TRO.

Thereafter, on January 11, 1982, the New Mexico district court issued a preliminary injunction enjoining TUC and Chaco from proceeding further in the Texas action. On January 14, 1982, Hospah, SFI, SFM and SFR filed a motion to stay or in the alternative to dismiss the Texas action in the Texas court. They did so in light of the New Mexico injunction. The Texas court issued an order requiring TUC and Chaco to respond to the motion to stay. TUC and Chaco then filed in the New Mexico court a motion to suspend the preliminary injunction in order

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[1] Hospah, SFI, SFR and SFM also asserted that the Texas action should not be allowed to proceed because Hospah was an indispensable party to that action. Inasmuch as the New Mexico court did not specifically address that issue, but rather issued the injunction upon finding that the venue selection clause controlled, we do not deem it necessary to address that issue. In any event, the defense of failure to join an indispensable party is properly the subject of a rule 12(b) motion, FRCP, 28 U.S.C.A.

to allow them an opportunity to respond to the stay motion in the Texas action. The New Mexico court denied the motion to suspend the injunction. Thereupon, TUC and Chaco filed this appeal, together with a motion to stay the New Mexico injunction pending appea and a motion to expedite hearing of the appeal. We granted the motion to stay the injunction pending appeal and we expedited the hearing.

Prior to the denial of the motion to suspend the injunction in the New Mexico court, TUC and Chaco filed another suit in the same New Mexico court raising the same allegations as those in the Texas action. TUC and Chaco also filed an answer and a counterclaim in the original New Mexico action. In all of their New Mexico filings, TUC and Chaco reserved their rights to object to venue.

The ultimate issue to be resolved is which court should exercise venue and hear the case. Thus, the issue before us is which court should make the determination on the ultimate issue of venue.

Both parties recognize the general rule that when two courts have concurrent jurisdiction, the first court in which jurisdiction attaches has priority to consider the case. *O'Hare International Bank v. Lambert*, 459 F.2d 328 (10th Cir. 1972), and cases cited therein. The parties disagree, however, as to where jurisdiction first attached. TUC and Chaco contend that the Texas court obtained jurisdiction first because the complaint was filed in that court prior to the filing of the complaint in the New Mexico court. Hospah, SFI, SFR and SFM contend that because service of process was accomplished first in the New Mexico action, jurisdiction attached first in the New Mexico court.

This circuit has adopted the rule announced in *Barber Greene Company v. Blaw-Knox Company*, 239 F.2d 774, 778 (6th Cir. 1957) that, "in both *in rem* and *in personam*

actions, jurisdiction relates back to the filing of the complaint." Accord, *Product Engineering and Manufacturing, Inc. v. Barnes*, 424 F.2d 42 (10th Cir. 1970). The rule that jurisdiction relates back to the filing of the complaint gives effect to Fed. Rules Civ. Proc. rule 3, 28 U.S.C.A., which provides that, "[a] civil action is commenced by filing a complaint with the court." Accordingly, we must hold that jurisdiction over the parties and issues herein attached first in the Texas district court.

In *O'Hare International Bank v. Lambert*, *supra* at 331, we recognized this exception to the first-to-file rule: "[t]he only justification for employment of injunctive power by a court in a case such as this is to prevent a misuse of litigation in the nature of vexatious and oppressive foreign suits." The New Mexico district court ruled that the Texas action was vexatious, and the injunction was issued on that basis. Apparently, the New Mexico court perceived the Texas action as an attempt by TUC and Chaco to circumvent the venue selection clause in the coal lease.

The existence of a venue selection clause does not impose an absolute duty nor does it endow a party with an absolute right to have every dispute between the parties litigated in the named forum. The applicability of the venue selection clause is an issue of fact in and of itself. We do not consider it vexatious for a party to raise this issue in a forum other than the one designated in the venue selection clause.[2]

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[2] While we are not here in a position to rule on the applicability of the venue selection clause, we are of the view that the case presents a genuine issue of fact in that regard. In light of the fact that the Texas complaint alleges a conspiracy commencing on or about 1974 and the lease containing the selection clause was not entered into until 1977 it is not clear to us that the venue selection clause controls. Furthermore, it is not readily apparent to us that the lease is binding on parties to this lawsuit who are not parties to the lease. These are factors for the district court to consider.

Fed. Rules Civ. Proc. rule 12(b), 28 U.S.C.A., requires a party to assert a defense of improper venue by way of motion or responsive pleading. If we were to permit a party to object to venue by filing suit for injunctive relief in a separate forum, we would, in essence, be rendering rule 12(b) a nullity. The fact that a venue selection clause is involved does not negate the requirements of rule 12(b). Were it otherwise, a party to such a contract would be invading the province of the courts to decide issues of venue. Such an interpretation of the effect of a venue selection clause generated the initial dislike of the courts for such clauses. *See The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

In a similar vein, § 1404(a), 28 U.S.C.A. establishes a procedure whereby a party may request a change of venue. If we were to allow a party who desires or asserts a right to litigate his suit in a court other than that where the challenged suit is first filed, we would render the procedures outlined in § 1404(a) little more than an exercise in futility.

Hospah, SFI, SFR and SFM chose to totally ignore the requirements of Fed. Rules Civ. Proc. rule 12(b), 28 U.S.C.A. and failed to avail themselves to the procedures outlined in § 1404(a), 28 U.S.C.A. Instead they went directly to the New Mexico court and asked for an injunction.

The authorities relied upon by Hospah, SFI, SFR, and SFM to support their procedure, *Columbia Plaza Corp. v. Security Nat. Bank*, 525 F.2d 620 (D.C. Cir. 1975), *William Gluckin Co. v. International Platex Corp.*, 407 F.2d 177 (2d Cir. 1969), among others, in turn rely upon *Kerotest Mfg. Co. v. C-0-Two Co.*, 342 U.S. 180 (1952) for the proposition that the first-to-file rule is not entitled to "mechanical application". We agree to the extent we find that *Kerotest* stands for the proposition that simply because a court is the first to obtain jurisdiction does not necessarily mean that it should decide the *merits*

of the case. However, in *Kerotest* the Court pays great deference to the district court's ability to decide if it should accept venue.[3] We believe that *Kerotest* is in line with our view that the court which first obtains jurisdiction should be allowed to first decide issues of venue.

> The manufacturer who is charged with infringing a patent cannot stretch the Federal Declaratory Judgments Act to give him a paramount right to choose the forum for trying out questions of infringement and validity. He is given an equal start in the race to the courthouse, not a headstart. If he is forehanded, subsequent suits against him by the patentee can within the trial court's discretion be enjoined pending determination of the declaratory judgment suit, and a judgment in his favor bars suits against his customers. If he is anticipated, the court's discretion is broad enough to protect him from harassment of his customers. If the patentee's suit against a customer is brought in a district where the manufacturer cannot be joined as a defendant, the manufacturer may be permitted simultaneously to prosecute a declaratory action against the patentee elsewhere. And if the manufacturer is joined as an unwilling defendant in a *forum non conveniens, he has available upon an appropriate showing the relief provided by § 1404(a)* of the Judicial Code. 62 Stat. 869, 937, 28 U.S.C. § 1404(a).
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> 342 U.S. at pp. 185, 186. [Emphasis supplied]. [Footnotes omitted].

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[3] Hospah, SFI, SFM and SFR intimated throughout that because the outcome of this litigation would affect Texas consumers, their rights may not be adequately protected in the Texas courts. The Court in *Kerotest* addressed a similar argument. There, the Court said, "Such apprehension implies a lack of discipline and of disinterestedness on the part of the lower courts, hardly a worthy or wise basis for fashioning rules of procedure." 342 U.S. at p. 185.

In summary, the declaratory judgment action cannot be used as a substitute for the rules of civil procedure in response to a pending lawsuit, *Public Service Comm'n. v. Wycoff Co.*, 344 U.S. 237 (1952), *Product Engineering and Manufacturing, Inc. v. Barnes, supra*,[4] nor can declaratory judgment be used as yet another weapon in a game of procedural warfare. *Kerotest Mfg. Co. v. C-O-Two Co., supra.*

The motion to dismiss this appeal as moot filed February 19, 1982, by plaintiffs-appellees is denied. The motion to reinstate preliminary injunction pending appeal filed February 19, 1982, by plaintiffs-appellees is denied.

The cause is remanded to the district court with instruction to dismiss the preliminary injunction.

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[4] Although these cases involve federal-state relationships, the underlying principals are equally applicable to comity between the federal courts.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. CV-81-1042 JB

HOSPAH COAL COMPANY, *et al.*,
Plaintiffs,

v.

CHACO ENERGY COMPANY, *et al.*,
Defendants.

[Filed Jan. 11, 1982]

PRELIMINARY INJUNCTION

The above-captioned and referenced matter having come on for hearing on the motion of the Plaintiffs, Hospah Coal Company, Santa Fe Industries, Inc., The Atchison, Topeka and Santa Fe Railway Company and Santa Fe Mining, Inc., by their attorneys, for a preliminary injunction restraining and enjoining the Defendants, Chaco Energy Company and Texas Utilities Company, from further conducting judicial proceedings involving, arising out of, or relating to the Coal Lease between Hospah Coal Company and Chaco Energy Company, dated April 15, 1977, or the Surety Agreement between Hospah Coal Company and Texas Utilities Company, dated April 15, 1977, in any jurisdiction other than New Mexico and requiring the Defendants to forthwith dismiss, as against these Plaintiffs, Cause No. CA3-81-2224 D now pending in the United States District Court for the Northern District of Texas; the parties having appeared in person and by counsel; the Court having considered the pleadings and the arguments of counsel, having expressed its reasons for its decision in open Court, and having announced its findings of fact

and conclusions of law, which are incorporated herein by reference, finds that Plaintiff's Motion for Preliminary Injunction should be granted as follows:

IT IS THEREFORE ORDERED that Defendants, Chaco Energy Company and Texas Utilities Company, their officers, agents, servants, employees, attorneys, and all persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise, be, and they hereby are, restrained and enjoined from further conducting judicial proceedings, as against these Plaintiffs, involving, arising out of, or relating to the Coal Lease between Hospah Coal Company and Chaco Energy Company, dated April 15, 1977, or the Surety Agreement between Hospah Coal Company and Texas Utilities Company, dated April 15, 1977, in any jurisdiction other than New Mexico.

IT IS FURTHER ORDERED that Defendants, Chaco Energy Company and Texas Utilities Company, their officers, agents, servants, employees, attorneys, and all persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise, be, and they hereby are, restrained and enjoined from conducting, requesting or participating in any judicial proceedings, as against these Plaintiffs, in Cause No. CA3-81-2224 D now pending in the United States District Court for the Northern District of Texas.

IT IS FURTHER ORDERED that no security shall be required for the issuance of this Preliminary Injunction.

/s/ Juan G. Burciaga,
JUAN G. BURCIAGA
United States District Judge

APPROVED AS TO FORM:

/s/ John R. Cooney
JOHN R. COONEY
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For Plaintiffs

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APPENDIX C

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. CV 81-1042 (JB)

HOSPAH COAL COMPANY, a Delaware corporation, SANTA FE INDUSTRIES, INC., a Delaware corporation, THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a Delaware corporation, and SANTA FE MINING, INC., a Kansas corporation,

Plaintiffs,

vs.

CHACO ENERGY COMPANY, a New Mexico corporation, and TEXAS UTILITIES COMPANY, a Texas corporation,

Defendants.

MOTION FOR PRELIMINARY INJUNCTION
PARTIAL TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED that on to-wit, the eighth day of January, 1982, this matter came on for hearing before the HONORABLE JUAN G. BURCIAGA, United States District Judge, sitting in open court at Albuquerque, New Mexico, at the hour of nine thirty o'clock in the forenoon.

* * * *

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By: Mr. Gordon B. Spivack

* * * *

(THEREUPON, the following is a requested portion of transcript consisting of findings of the Court.)

[3] THE COURT: First, the Court wishes to commend counsel for their excellent briefs in this case, and also the argument.

The Court does not take this task lightly, inasmuch as there is hard law which would militate against one federal district court enjoining proceedings in a second such court. However, in this case, the Court is going to grant the preliminary injunction, and my statements will constitute the findings of fact and conclusions of law.

First, it appears from the complaint filed in the Texas proceeding that although it is a multicount complaint, and that the present defendants in this case—excuse me —the present plaintiffs in this case are named only in the—I believe the seventh and eighth counts, and although the complaint sounds on antitrust violations in the remaining counts, as well, the Court concurs with at least the tentative finding of Judge Sanders in the Texas proceeding where the present defendants applied for a temporary restraining order, that the substance of the Texas complaint, as well as the New Mexico complaint, center around the contract about which reference has been made.

It is clear, at least, and the Court finds, that the contract or the coal lease entered between Hospah Coal and Chaco Energy Company by the terms of the contract and the security agreement are as binding upon T.U.C. as they are upon [4] Chaco. In other words, the Court is finding that T.U.C. is a party to the contract.

It is also the Court's finding that the provisions of the coal lease contemplated all types of suit, including those alleging fraud. And, therefore, that the choice of forum provision would apply in any lawsuit arising from the coal lease.

The Court also finds that there is no public policy against a choice of forum provision, and that it's not against public policy in New Mexico, and that it is a provision which was duly contracted for between the parties, and each party is entitled to rely upon that provision.

Now, the Court has reviewed the *O'Hare*, and in that connection the Court wishes to make some observations. It is true that *Products Engineering and Manufacturing, Inc. v. Barnes* seems to suggest that the first filing would control jurisdiction of a court. However, the Court is not persuaded, and that case is distinguishable. It appears that in that case a federal action was filed for the purpose of asserting a defense to a state court action, and so the—that, at least that holding would have no application to this case.

The Court also finds that under the *Beacon Hill Theatre* case, that a lawsuit to establish that someone has not violated the antitrust provisions is an independent type of action which can be properly brought in federal court. And, so, therefore, [5] the lawsuit filed here in this court is a proper one.

Now, in that connection, the Court finds that the courts [choice] of law provision is a proper provision which would also control in that case. Now, admittedly, *O'Hare International Bank* states a hard test to meet for a federal court to enjoin proceedings in another federal court having concurrent jurisdiction. However, I also would find that from the review of the pleadings and the manner in which the lawsuit was brought in Texas, and then the move by the present defendants to quickly move for a temporary restraining order restraining the present plaintiffs from proceeding in this action, is vexatious.

And I would find, at least make the initial observation, that it would appear at least initially to the Court that there was forum shopping, and that, again, is also an element which the Court takes into consideration in granting the preliminary injunction and assuming jurisdiction, or precluding the present defendants from proceeding in the Texas action.

For the issuance of a preliminary injunction, it is necessary for the movant to prove four elements under the Tenth Circuit case of *Lundgrin v. Claytor*. The first is substantial likelihood that the movant will eventually prevail on the merits. However, that element, as hard as

it is to establish, the Court has gone on to state that it is not necessary that the movant's right to a final decision be absolutely certain [6] or wholly without doubt; that if the other elements are present, that is, the balance of hardships tips decidely toward the movant, that it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, and difficult and doubtful as to make them fair grounds for litigation. So the Court finds that the first element is satisfied by the movants in this case.

The second element is a showing that the movant will suffer irreparable injury unless the injunction issues. In this case, I find that I have found that the choice of forum provisions is enforceable, that the movants in this case, the plaintiffs, were entitled to rely upon that, and by their having to litigate in a forum which was not of their choosing and against a contractual provision which is enforceable, that that—that they would suffer irreparable injury unless the injunction issues.

The third element is proof that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party. Here again, we have the odd situation where Hospah is not named in the lawsuit in Texas, so a transfer in the event that court were to transfer the case would serve no purpose, inasmuch as Hospah is not named to the lawsuit, and Hospah would appear, at least at this time, to be an indispensable party to the action.

And, further, again, that, coupled with the fact that the [7] plaintiffs are entitled to rely upon the provision of the choice of forum, the choice of forum provision, and they would not be able to litigate in a forum which they contracted for, and, therefore, the Court would find that any threatened injury, that the threatened injury to the movant—in this case the plaintiffs—would outweigh any proposed—any damage which might be caused to the present defendants.

That the—and I further find that the defendants are able to bring all the parties that they are suing in Texas into New Mexico.

Moreover, I should state that from the briefs of the parties and reading of the complaint, both here in New Mexico and the Texas complaint, it is clear that all of the contacts that have any substance have originated in New Mexico, and will have its primary impact in New Mexico, and so this would be the proper forum to try the case.

The fourth element and final element imposed upon the movant for a preliminary injunction is a showing that injunction, if issued, would not be adverse to the public interest. I would think that this element is probably the most—the strongest and most compelling in this case, inasmuch as the coal deposits are in New Mexico, the railroad—the problems about railroad transportation about which complaint is made in the Texas lawsuit are located in New Mexico, that the contracts were executed in New Mexico, and whatever the determination of [8] the case will—however the decision may go will have a serious impact and the strongest impact in New Mexico. And for that reason, I would find that if the injunction issues, that it would not be adverse to the public interest.

So what I have stated will constitute the findings of fact and conclusions of law of the Court. And Mr. Cooney, if you'll please prepare an appropriate order for signature and submit it to the Court at nine thirty on Monday morning—

MR. COONEY: Well, Your Honor, thank you very much.

THE COURT: Anything further to come before the Court?

MR. COONEY: No, Your Honor.

THE COURT: Court will stand in recess.

(THEREUPON, court stood in recess.)

(THEREUPON, the requested portion of transcript was concluded.)

[Reporter's Certificate Omitted in Printing]

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. CA3-81-2224D

TEXAS UTILITIES COMPANY AND
CHACO ENERGY COMPANY,
Plaintiffs,

v.

SANTA FE INDUSTRIES, INC., THE ATCHISON, TOPEKA, AND SANTA FE RAILWAY CO., SANTA FE MINING, INC., THERCOL ENERGY CO., AND PEABODY COAL COMPANY,
Defendants

ANTITRUST, FRAUD AND CONTRACT COMPLAINT FOR DAMAGES, EQUITABLE, AND DECLARATORY RELIEF UNDER FEDERAL AND STATE LAWS AND DEMAND FOR JURY TRIAL

Plaintiffs Texas Utilities Company and Chaco Energy Company (collectively referred to as "Plaintiffs") bring this action against Defendants Santa Fe Industries, Inc., The Atchison, Topeka and Santa Fe Railway Co., Santa Fe Mining, Inc., Thercol Energy Co. and Peabody Coal Company (collectively referred to as "Defendants"), demand trial by jury, and complain and allege, on knowledge as to matters pertaining to themselves and on information and belief as to all other matters, as follows:

JURISDICTION AND VENUE

1. This Complaint is filed and this action is instituted for damages and equitable relief under Sections 4 and 16

of the Clayton Act (15 U.S.C. Sections 15, 26) and the laws of the State of New Mexico, and for a Declaratory Judgment and other necessary and proper relief pursuant to 28 U.S.C. Sections 2201, 2202. This court has jurisdiction over the subject matter of this action under 28 U.S.C. Section 1337 and the doctrine of pendent jurisdiction.

2. Each of the Defendants herein is found, maintains an office, or transacts business within this District. The violations hereinafter alleged took place in part within this District. Venue in this District is proper under 15 U.S.C. Section 22 and 28 U.S.C. Section 1391.

PARTIES

3. Plaintiff Texas Utilities Company ("Texas Utilities") is a Texas corporation having a principal place of business at Dallas, Texas. Texas Utilities is a holding company whose subsidiaries are engaged in the business of servicing the electrical energy needs of more than four million people in Texas. In the course of its business, Texas Utilities has sought to purchase and its subsidiaries have purchased rights to fuel reserves, including coal, located in New Mexico and elsewhere.

4. Plaintiff Chaco Energy Company ("Chaco") is a New Mexico corporation having a principal place of business in the County of Bernalillo, New Mexico. Chaco is a subsidiary of Texas Utilities engaged in the business of fuel acquisition and sale, including the acquisition and development of coal reserves in New Mexico to be transported to locations in New Mexico, Texas and other states.

5. Defendant Santa Fe Industries, Inc. ("SFI") is a Delaware corporation having a principal place of business in Chicago, Illinois. Its subsidiaries include The Atchison, Topeka and Santa Fe Railway Co. and Santa Fe Mining, Inc. (also named as Defendants herein) and Star Lake Railroad Co., Hospah Coal Co. and Santa Fe Natural

Resources, Inc. (named as Co-conspirators herein). During the period of time covered by this Complaint, SFI and its divisions and subsidiaries have manufactured and distributed goods and provided services in many states, including the States of Texas and New Mexico, and have been involved in developing and leasing coal properties in the States of New Mexico, Colorado, and Kansas.

6. Defendant The Atchison, Topeka and Santa Fe Railway Co. ("SFR") is a wholly-owned subsidiary of SFI. It is a Delaware corporation, having a principal place of business in Chicago, Illinois. During the period of time covered by this Complaint, SFR has been a common carrier by rail engaged in the business of transporting goods and commodities, including coal, in the States of Texas and New Mexico and in interstate commerce.

7. Defendant Santa Fe Mining, Inc., formerly known as Cherokee & Pittsburg Coal and Mining Co. ("Cherokee"), is a Kansas corporation having a principal place of business in Albuquerque, New Mexico. It is a wholly-owned subsidiary of Santa Fe Natural Resources, Inc. and is engaged in the business of developing hard mineral reserves, including coal reserves in the San Juan Basin Area of New Mexico. On February 3, 1979, Cherokee's name was changed to Santa Fe Mining, Inc. On April 5, 1977, Cherokee's wholly-owned subsidiary, Hospah Coal Co., was formed to enter into contracts regarding certain interests in coal assigned to it by Cherokee and/or SFI on April 6, 1977. Some of the acts hereinafter alleged were committed by Hospah acting as the instrumentality of Cherokee or Santa Fe Mining, Inc.

8. Defendant Thercol Energy Co. ("Thercol") is a joint venture of Thermal Energy Co. (a joint venture organized under the laws of Texas) and Peabody Coal Co. organized under the laws of the State of Texas for the purpose of developing coal reserves in the San Juan Basin Area. Peabody is the Manager of the Thercol joint venture.

9. Defendant Peabody Coal Company is a Delaware Corporation having a principal place of business in St. Louis, Missouri. Peabody is the largest producer of coal in the United States and owns coal reserves and mining, production and distribution facilities in several states, including the States of New Mexico, Colorado and Arizona.

CO-CONSPIRATORS

10. Star Lake Railroad Co. ("Star Lake"), a wholly-owned subsidiary of SFR, Hospah Coal Co. ("Hospah"), a wholly-owned subsidiary of Santa Fe Mining, Inc., and Santa Fe Natural Resources, Inc., a wholly-owned subsidiary of SFI, are hereby named as Co-conspirators herein. Other business organizations and individuals presently unknown to the Plaintiffs also participated in and performed acts in furtherance of the violations alleged in this Complaint.

DEFINITIONS

11. As used in this Complaint:

(a) the term "Santa Fe Defendants" shall refer to any one or more of the following companies: SFI, SFR and Santa Fe Mining, Inc.;

(b) the term "San Juan Basin Area" shall refer to San Juan Basin region of New Mexico; and

(c) the term "subsidiary" shall refer to subsidiaries of subsidiaries in addition to subsidiaries.

TRADE AND COMMERCE

12. The San Juan Basin Area contains extensive coal reserves and is prospectively the site of extensive coal mining activity. During the period of time covered by this Complaint, the Santa Fe Defendants have controlled over 600,000,000 tons of coal and Thercol has controlled over 250,000,000 tons of coal in the San Juan Basin Area.

13. During the period of time covered by this Complaint, the Santa Fe Defendants and Co-conspirator Hospah have owned agreements, rights and interests in or to coal located in the Gallo Wash, Star Lake, South Hospah, The Divide and the Lee Ranch regions of the San Juan Basin Area. During the same period, Thercol has owned agreements, rights and interests in or to coal located in the Gallo Wash and Star Lake regions of the San Juan Basin Area.

14. During the period of time covered by this Complaint, no unitization agreement, joint operating agreement or joint venture has existed between the Santa Fe Defendants and Thercol.

15. The only economical means of transporting large volumes of coal from the San Basin Area is by rail. The railroad controlled by the Santa Fe Defendants is the only interstate common carrier reasonably proximate to the San Juan Basin Area. Accordingly, access to that railroad on reasonable terms is essential to anyone wishing to mine coal in the San Juan Basin Area for use outside the San Juan Basin Area.

16. The actions of the Defendants and Co-conspirators complained of in this Complaint have been in and have affected interstate commerce. During the period of time covered by this Complaint, the Plaintiffs have sought to obtain from the Defendants access to coal in the San Juan Basin Area for sale to generating plants in Texas and for sale to other customers in states other than the State of New Mexico.

BACKGROUND OF THE VIOLATIONS

17. In the early 1970's, Plaintiff Texas Utilities decided to seek a continuous supply of coal at reasonable prices to sell to its subsidiaries and to third parties at a profit. Therefore, until mid-1974, Plaintiff Texas Utilities negotiated separately with the Santa Fe Defendants and Ther-

col regarding the lease and acquisition of coal properties located in the San Juan Basin Area.

18. Beginning in mid-1974, Thercol and the Santa Fe Defendants joined together to negotiate with Plaintiff Texas Utilities regarding the sale or lease of their respective coal properties. A senior executive of SFI represented both the Santa Fe Defendants and Thercol in these negotiations.

19. A Memorandum of Intent, attached hereto as Exhibit A, was signed by Texas Utilities Services Inc. (a subsidiary of Plaintiff Texas Utilities), Cherokee, and Thercol on May 24, 1976. The Memorandum provided substantially as follows:

> (a) the Santa Fe Defendants would sub-lease their rights to develop and mine coal in the Star Lake, Gallo Wash, and South Hospah regions to subsidiaries of Texas Utilities for a royalty of $3.70 per ton of coal mined over the term of the lease to be adjusted in accordance with a formula set forth therein ("Coal Lease");
>
> (b) Thercol would convey an undivided one-third of its rights to or in coal reserves in the Gallo Wash and Star Lake regions to subsidiaries of Texas Utilities, and would enter into a joint venture agreement with subsidiaries of Texas Utilities for the operation and development of the one-third interest thus conveyed as well as the remaining two-thirds interest. A per ton royalty identical to the one specified in the Santa Fe Defendants' sub-lease was to be paid by subsidiaries of Texas Utilities to Thercol for Thercol's undivided two-thirds proportionate share of coal mined from the subject properties, and the price of the one-third interest was to be calculated using that figure;
>
> (c) the terms of the Santa Fe Defendants' Coal Lease and the Thercol joint venture agreement would

extend until such time as the subject coal had been mined or 45 years, whichever was less;

(d) under each contract, a minimum amount of coal was to be extracted each year, and royalties on this amount were to be paid whether or not the minimum tonnage was in fact extracted. Both the royalties and the minimum tonnage were to escalate over the term of the contracts;

(e) under each contract, there would be a limitation on the amount of coal extracted from the deposits that could be sold by subsidiaries of Texas Utilities to third parties;

(f) under each contract, there would be paid by subsidiaries of Texas Utilities to the Santa Fe Defendants and Thercol 50% of the net profits of subsidiaries of Texas Utilities, calculated in accordance with a formula set forth in each contract, on sales to third parties; and

(g) under each contract, payment of the 50% of such profits on third party sales would be calculated as though the sales were made at "prevailing market price" even if the sales were actually made substantially below that price.

20. The Memorandum of Intent provided that satisfactory coal transportation service would be obtained to and from the mining areas prior to the execution of the agreements therein contemplated. Although Plaintiffs and the Santa Fe Defendants reached no final agreements with respect to rail transportation service following execution of the Memorandum of Intent, negotiations of the agreements contemplated therein continued on the understanding that adequate rail transportation service on reasonable terms and at reasonable transportation rates would be furnished by the Santa Fe Defendants or that Plaintiffs would be permitted to construct, own and operate a rail-

road from the San Juan Basin Area to a point of connection with the Santa Fe Defendants' main line trackage.

21. The Memorandum of Intent was cancelled in October 1976 and a $750,000 commitment fee forfeited. Thereafter, Plaintiffs instituted separate negotiations with the Santa Fe Defendants and separate negotiations with Thercol. Notwithstanding that new negotiations were separately entered into by Plaintiffs with the Santa Fe Defendants and Defendant Thercol, said Defendants continued to insist upon prices and terms substantially identical to those contained in the Memorandum of Intent. Chaco entered into four contracts with Thercol on January 26, 1977 and entered into a separate contract with Hospah on April 15, 1977 regarding some of the Defendants' coal rights in the San Juan Basin Area. Texas Utilities entered into a related Surety Agreement with Hospah on April 15, 1977. These agreements are attached hereto as Exhibits B, C, D, E, F and G, respectively. Subsequently, Exhibit E was terminated, and Exhibit D was partially terminated.

22. The contracts between Defendants (and Co-conspirator Hospah) and Plaintiffs contemplate ongoing and continuous business relationships between the parties, including payment and adjustment of royalties, preparation of an annual mining plan by Plaintiff Chaco and review thereof by the Santa Fe Defendants, and preparation of a development plan by Plaintiff Chaco and review thereof by an Administrative Committee comprised of representatives of Thercol and Plaintiff Chaco. Pursuant to the contract between Chaco and Hospah dated April 15, 1977, the Plaintiffs and Santa Fe Defendants negotiated an amendment to said contract, attached hereto as Exhibit H, which was executed February 12, 1981.

23. After entering these contracts, Plaintiffs continued to seek from the Santa Fe Defendants adequate rail transportation service on reasonable terms and at reasonable

transportation rates from the San Juan Basin Area. But the Santa Fe Defendants and Co-conspirator Star Lake have refused to provide Plaintiffs with adequate railroad transportation service on reasonable terms, have refused to agree on reasonable transportation rates and have refused to permit Plaintiffs to construct, own and operate a railroad from the San Juan Basin Area.

24. Plaintiff Chaco has paid and continues to pay to Co-conspirator Hospah substantial sums for coal it has not mined and cannot economically mine as a result of the unavailability of rail transportation and the high royalty rates due to the Defendants. Plaintiff Chaco, by reason of a Force Majeure provision in its contract with Thercol, has not paid Thercol for coal it has not mined and cannot economically mine; but Thercol has insisted on payment from Chaco nevertheless.

VIOLATIONS CHARGED

VIOLATIONS OF SECTION 1 OF THE SHERMAN ACT

First Cause of Action

25. Beginning at least as early as 1974, the exact date being unknown to Plaintiffs, and continuing thereafter up to and including the date of filing this Complaint, the Defendants and Co-conspirators entered into contracts and engaged in a continuing combination and conspiracy in unreasonable restraint of interstate trade and commerce in violation of Section 1 of the Sherman Act (15 U.S.C. Section 1). These violations are continuing and will continue unless the relief hereinafter prayed for is granted.

26. The aforesaid violations have consisted of continuing contract negotiations and contractual arrangements imposed by Defendants and Co-conspirators on Plaintiffs and a continuing understanding and concert of action

among the Defendants and Co-conspirators, the substantial terms of which have been and are:

(a) to fix, maintain and stabilize the price of coal rights in the San Juan Basin Area;

(b) to restrict competition in the production and sale of coal from the San Juan Basin Area; and

(c) to refuse to negotiate with Plaintiffs on any terms other than those agreed to among the Defendants and Co-conspirators.

27. During the period of time covered by this Complaint, the Defendants and Co-conspirators, in the course of forming and for the purpose of effectuating the aforesaid contracts, combination and conspiracy, have done, among other things, the following:

(a) fixed the royalty and other payments to be made by Plaintiffs at artificially and unreasonably high levels;

(b) the Santa Fe Defendants prevented Plaintiffs from obtaining or providing rail transportation to and from the San Juan Basin Area on reasonable terms;

(c) imposed a limitation on the quantity of coal the Plaintiffs could sell to third parties;

(d) agreed to penalize Plaintiffs for selling coal to third parties by requiring additional royalties on such sales;

(e) agreed to discourage Plaintiffs from cutting prices on sales to third parties by calculating the additional royalty payments for such sales at the "prevailing market price" rather than the actual sales price; and

(f) refused to negotiate with Plaintiffs on terms other than those agreed to among the Defendants and Co-conspirators.

VIOLATIONS OF SECTION 2 OF THE SHERMAN ACT

Second Cause of Action

28. Plaintiffs repeat and reallege the allegations of Paragraphs 1 to 24 of this Complaint as if fully set forth herein.

29. Beginning at least as early as 1974, the exact date being unknown to Plaintiffs, Defendants and Co-conspirators have engaged in a continuing combination and conspiracy to monopolize the aforesaid trade and commerce in production and transportation of coal from the San Juan Basin Area in violation of Section 2 of the Sherman Act (15 U.S.C. Section 2). This violation is continuing and will continue unless the relief hereinafter prayed for is granted.

30. The aforesaid combination and conspiracy has consisted of continuing contract negotiations and contractual arrangements imposed by Defendants and Co-conspirators on Plaintiffs and a continuing understanding and concert of action among the Defendants and Co-conspirators designed to foreclose competition, obtain a substantial competitive advantage and control the price and production of coal in the San Juan Basin Area.

31. During the time covered by this Complaint, the Defendants and Co-conspirators, in the course of forming and for the purpose of effectuating the aforesaid combination and conspiracy, have done, among other things, the things set forth in Paragraph 27 of this Complaint.

Third Cause of Action

32. Plaintiffs repeat and reallege the allegations of Paragraphs 1 to 24 of this Compaint as if fully set forth herein.

33. Beginning at least as early as 1974, the exact date being unknown to Plaintiffs, and continuing thereafter up to and including the date of filing this Complaint, the Santa Fe Defendants and Co-conspirators have monopolized, attempted to monopolize and combined and conspired to monopolize the aforesaid trade and commerce in production and transportation of coal from the San Juan Basin Area in violation of Section 2 of the Sherman Act (15 U.S.C. Section 2). These violations are continuing and will continue unless the relief hereinafter prayed for is granted.

34. Pursuant to and in furtherance of the aforesaid monopolization, attempted monopolization and combination and conspiracy to monopolize, the Santa Fe Defendants and Co-conspirators have pursued a common course of conduct and concert of action to use their monopoly power in rail transportation to foreclose competition or obtain a substantial competitive advantage in the production and sale of coal from the San Juan Basin Area.

35. In the course of monopolizing, attempting to monopolize and combining and conspiring to monopolize the aforesaid trade and commerce, the Santa Fe Defendants and Co-conspirators have done, among other things, the things set forth in Paragraph 27 of this Complaint, and have:

(a) exercised their monopoly power over rail transportation that can economically serve the San Juan Basin Area to control the prices and production of coal in the San Juan Basin Area; and

(b) exercised their monopoly power over rail transportation that can economically serve the San Juan Basin Area to exclude competition and obtain a substantial competitive advantage in the production and transportation of coal from the San Juan Basin Area.

VIOLATIONS OF SECTION 57-1-1 OF THE NEW MEXICO ANTITRUST ACT

Fourth Cause of Action

36. Plaintiffs repeat and reallege the allegations of Paragraphs 1 to 24 of this Complaint as if fully set forth herein.

37. Beginning at least as early as 1974, the exact date being unknown to Plaintiffs, and continuing thereafter up to and including the date of filing this Complaint, the Defendants and Co-conspirators entered into contracts and engaged in a continuing combination and conspiracy in unreasonable restraint of New Mexico trade and commerce in violation of Section 57-1-1 of the New Mexico Antitrust Act (N.M. Stat. Ann. Section 57-1-1). These violations are continuing and will continue unless the relief hereinafter prayed for is granted.

38. The aforesaid violations have consisted of continuing contract negotiations and contractual arrangements imposed by Defendants and Co-conspirators on Plaintiffs and a continuing understanding and concert of action among the Defendants and Co-conspirators, the substantial terms of which have been and are:

(a) to fix, maintain and stabilize the price of coal rights in the San Juan Basin Area;

(b) to restrict competition in the production and sale of coal from the San Juan Basin Area; and

(c) to refuse to negotiate with Plaintiffs on any terms other than those agreed to among the Defendants and Co-conspirators.

39. During the period of time covered by this Complaint, the Defendants and Co-conspirators, in the course of forming and for the purpose of effectuating the aforesaid contracts, combination and conspiracy, have done, among other things, the following:

(a) fixed the royalty and other payments to be made by Plaintiffs at artificially and unreasonably high levels;

(b) the Santa Fe Defendants prevented Plaintiffs from obtaining or providing rail transportation to and from the San Juan Basin Area on reasonable terms;

(c) imposed a limitation on the quantity of coal that Plaintiffs could sell to third parties;

(d) agreed to penalize Plaintiffs for selling coal to third parties by requiring additional royalties on such sales;

(e) agreed to discourage Plaintiffs from cutting prices on sales to third parties by calculating the additional royalty payments for such sales based on the "prevailing market price" rather than the actual sales price; and

(f) refused to negotiate with Plaintiffs on terms other than those agreed to among the Defendants and Co-conspirators.

VIOLATIONS OF SECTION 57-1-2 OF THE NEW MEXICO ANTITRUST ACT

Fifth Cause of Action

40. Plaintiffs repeat and reallege the allegations of Paragraphs 1 to 24 of this Complaint as if fully set forth herein.

41. Beginning at least as early as 1974, the exact date being unknown to Plaintiffs, Defendants and Co-conspirators have engaged in a continuing combination and conspiracy to monopolize the aforesaid trade and commerce in production and transportation of coal from the San Juan Basin Area in violation of Section 57-1-2

of the New Mexico Antitrust Act (N.M. Stat. Ann. Section 57-1-2).

42. The aforesaid combination and conspiracy has consisted of continuing contract negotiations and contractual arrangements imposed by Defendants and Co-conspirators on Plaintiffs and a continuing understanding and concert of action among the Defendants and Co-conspirators designed to foreclose competition, obtain a substantial competitive advantage and control the price and production of coal in the San Juan Basin Area.

43. During the time covered by this Complaint, the Defendants and Co-conspirators, in the course of forming and for the purpose of effectuating the aforesaid combination and conspiracy, have done, among other things, the things set forth in Paragraph 39 of this Complaint.

Sixth Cause of Action

44. Plaintiffs repeat and reallege the allegations of Paragraphs 1 to 24 of this Complaint as if fully set forth herein.

45. Beginning at least as early as 1974, the exact date being unknown to Plaintiffs, and continuing thereafter up to and including the date of filing this Complaint, the Santa Fe Defendants and Co-conspirators have monopolized, attempted to monopolize and combined and conspired to monopolize the aforesaid trade and commerce in production and transportation of coal from the San Juan Basin Area in violation of Section 57-1-2 of the New Mexico Antitrust Act (N.M. Stat. Ann. Section 57-1-2).

46. Pursuant to and in furtherance of the aforesaid monopolization, attempted monopolization and combination and conspiracy to monopolize, the Santa Fe Defendants and Co-conspirators have pursued a common course of conduct and concert of action to use their monopoly power in rail transportation to foreclose com-

petition and obtain a substantial competitive advantage in the production and sale of coal from the San Juan Basin Area.

47. In the course of monopolizing, attempting to monopolize and combining and conspiring to monopolize the aforesaid trade and commerce, the Santa Fe Defendants and Co-conspirators have done, among other things, the things set forth in Paragraph 39 of this Complaint, and have:

(a) exercised their monopoly power over rail transportation that can economically serve the San Juan Basin Area to control the prices and production of coal in the San Juan Basin Area; and

(b) exercised their monopoly power over rail transportation that can economically serve the San Juan Basin Area to exclude competition or obtain a substantial competitive advantage in the production and transportation of coal from the San Juan Basin Area.

COMMON LAW CLAIMS

Seventh Cause of Action

48. Plaintiffs repeat and reallege the allegations of Paragraphs 1 to 24 of this Complaint as if fully set forth herein.

49. The Santa Fe Defendants fraudulently induced Plaintiffs to enter into the Coal Lease contract between Plaintiff Chaco and Co-conspirator Hospah, dated April 15, 1977, as amended February 12, 1981, and the related Surety Agreement between Plaintiff Texas Utilities and Hospah also dated April 15, 1977.

50. The Santa Fe Defendants fraudulently induced Plaintiff Chaco to enter into the Joint Development Agreements with Defendant Thercol dated January 26, 1977 and the Agreements of Sale and Purchase with Defendant Thercol also dated January 26, 1977.

51. Throughout the course of negotiations for the aforesaid contracts, the Santa Fe Defendants maintained interests in large quantities of coal on at least two properties in the San Juan Basin Area (other than their properties in the Gallo Wash, Star Lake and South Hospah regions), such properties being known as "The Divide" and the "Lee Ranch" properties; The Divide and the Lee Ranch properties were located closer to the SFR's main rail line than the Star Lake and Gallo Wash properties.

52. The Santa Fe Defendants knew or should have known that Plaintiffs believed that the Santa Fe Defendants had no interest (other than their interest in the South Hospah region) in property which contained large quantities of coal and which was located closer to the SFR's main rail line than the Star Lake and Gallo Wash properties.

53. The existence of said interests in large quantities of coal in The Divide and the Lee Ranch properties was a material fact which was withheld by the Santa Fe Defendants.

54. Plaintiffs entered into the Coal Lease contract and Surety Agreement with Hospah, both dated April 15, 1977, in reasonable reliance upon the non-existence of the aforesaid material fact which the Santa Fe Defendants failed to disclose.

55. Plaintiff Chaco entered into the Joint Development Agreements and the Agreements of Sale and Purchase with Defendant Thercol, each dated January 26, 1977, in reasonable reliance upon the non-existence of the aforesaid material fact which the Santa Fe Defendants failed to disclose.

56. The Santa Fe Defendants failed to disclose the aforesaid material fact to Plaintiffs even though they knew, or should have known, that Plaintiffs would not have entered into the Coal Lease contract and Surety

Agreement with Hospah or the Joint Development Agreements and Agreements of Sale and Purchase with Defendant Thercol had Plaintiffs been informed of the Santa Fe Defendants' interests in the coal in The Divide and the Lee Ranch properties.

57. Plaintiffs did not learn, and could not by the exercise of due diligence have learned, of the existence of the aforesaid material fact until sometime in 1981.

Eighth Cause of Action

58. Plaintiffs repeat and reallege the allegations of Paragraphs 1 to 24 of this Complaint as if fully set forth herein.

59. The Santa Fe Defendants fraudulently induced Plaintiff to enter into the Coal Lease contract between Plaintiff Chaco and Co-conspirator Hospah, dated April 15, 1977, as amended February 12, 1981, and the related Surety Agreement between Plaintiff Texas Utilities and Hospah also dated April 15, 1977.

60. The Santa Fe Defendants fraudulently induced Plaintiff Chaco to enter into the Joint Development Agreements with Defendant Thercol dated January 26, 1977 and the Agreements of Sale and Purchase with Defendant Thercol also dated January 26, 1977.

61. In the course of negotiating the aforesaid contracts, the Santa Fe Defendants knew that they would not provide or permit Plaintiffs to provide adequate rail transportation on reasonable economic terms for the coal to be mined in the San Juan Basin Area.

62. The Santa Fe Defendants knew or should have known that Plaintiffs believed that the Santa Fe Defendants would provide or permit Plaintiffs to provide adequate rail transportation on reasonable economic terms for the coal to be mined in the San Juan Basin Area.

63. That the Santa Fe Defendants would not provide or permit Plaintiffs to provide adequate rail transporta-

tion on reasonable economic terms for the coal to be mined in the San Juan Basin Area was a material fact.

64. Plaintiffs entered into the Coal Lease contract and Surety Agreement with Hospah, both dated April 15, 1977, in reasonable reliance upon the non-existence of the aforesaid material fact which the Santa Fe Defendants failed to disclose.

65. Plaintiff Chaco entered into the Joint Development Agreements and the Agreements of Sale and Purchase with Defendant Thercol, each dated January 26, 1977, in reasonable reliance upon the non-existence of the aforesaid material fact which the Santa Fe Defendants failed to disclose.

66. The Santa Fe Defendants failed to disclose the aforesaid material fact to Plaintiffs even though they knew, or should have known, that Plaintiffs would not have entered into the Coal Lease contract and Surety Agreement with Hospah or the Joint Development Agreements and Agreements of Sale and Purchase with Defendant Thercol had Plaintiffs been informed that the Santa Fe Defendants would not provide or permit Plaintiffs to provide adequate rail transportation on reasonable economic terms for the coal to be mined in the San Juan Basin Area.

67. Plaintiffs did not learn, and could not by the exercise of due diligence have learned, of the existence of the aforesaid material fact until sometime in 1981.

Ninth Cause of Action

68. Plaintiffs repeat and reallege the allegations of Paragraphs 1 to 24 of this Complaint as if fully set forth herein.

69. On January 26, 1977, Defendant Thercol and Plaintiff Chaco executed an Agreement of Sale and Purchase through which Thercol conveyed a one-third un-

divided interest in its coal leases in the Star Lake region down to 150 feet from the surface in return for $26,700,-300 paid by Chaco to Thercol.

70. On the same date, Defendant Thercol and Plaintiff Chaco executed a Joint Development and Operating Agreement (the "Joint Development Agreement") for the operation and development of the one-third interest thus conveyed as well as the remaining two-thirds interest in the Star Lake region ("Thercol Properties").

71. In Section 1 of the Joint Development Agreement, Plaintiff Chaco and Defendant Thercol agreed to "dedicate and commit all of the rights and interests in coal in the Thercol Properties in the Star Lake area to the 150 foot recovery line which can be *commercially mined* during the term of this [Joint Development] Agreement . . . upon the terms and conditions of this [Joint Development] Agreement." (Emphasis added) Section 46.1.32 of the Joint Development Agreement defined "commercially mined" to mean "operations which will provide reasonable net income."

72. On January 26, 1977, and at all times thereafter, there has been no coal in the Thercol Properties in the Star Lake region that can be "commercially mined," as defined in the Joint Development Agreement, upon the terms and conditions of the Joint Development Agreement. Thus, nothing was dedicated under the Joint Development Agreement, and no contract was created by the Joint Development Agreement.

73. Plaintiffs did not learn, and could not by the exercise of due diligence have learned, that there was no coal that can be "commercially mined" in the Thercol Properties in the Star Lake region until sometime in 1981.

INJURY AND DAMAGE TO PLAINTIFFS

74. There is an actual controversy between the parties.

75. As a direct and proximate result of Defendants' and Co-conspirators' violations of the federal and New Mexico antitrust laws and the common law violations alleged above, Plaintiffs have been and continue to be injured and financially damaged in their respective businesses and property in amounts which are presently undetermined.

76. As a result of the Santa Fe Defendants' fraud, misrepresentation, and deceit, Plaintiffs are purportedly obligated to make payments to Co-conspirator Hospah under the terms of the Coal Lease contract between Plaintiff Chaco and Hospah and the Surety Agreement between Plaintiff Texas Utilities and Hospah; Plaintiff Chaco is purportedly obligated to make payments to Defendant Thercol under the terms of the Joint Development Agreement; and Chaco has made payments to Co-conspirator Hospah under the terms of the Coal Lease contract and to Defendant Thercol under the terms of the Agreements of Sale and Purchase.

77. It is impractical to reasonably estimate the full amount of damages that will be incurred by Plaintiffs over the entire terms of their contracts with Defendant Thercol and Co-conspirator Hospah. There is, therefore, no adequate remedy at law for the injury Plaintiffs may suffer as a result of Defendants' unlawful conduct.

WHEREFORE, Plaintiffs request:

(a) that the court adjudge and decree that Defendants have violated Sections 1 and 2 of the Sherman Act and Sections 57-1-1 and 57-1-2 of the New Mexico Antitrust Act;

(b) that this court declare the Coal Lease contract dated April 15, 1977, as amended on February 12, 1981 between Plaintiff Chaco and Co-conspirator Hospah, the Surety Agreement dated April 15, 1977, between Plaintiff Texas Utilities and Co-conspirator Hospah, and the Joint Development and Operating

Agreements dated January 26, 1977, between Plaintiff Chaco and Defendant Thercol to be unlawful, null, void, and unenforceable;

(c) that the court order that the Agreements of Sale and Purchase dated January 26, 1977, between Plaintiff Chaco and Defendant Thercol be rescinded;

(d) that judgment be entered for Plaintiffs against Defendants for three-fold the amount of damages sustained by Plaintiffs, together with the costs of this action, including reasonable attorneys' fees;

(e) that the court enter judgment in favor of Plaintiffs and against the Santa Fe Defendants for all damages, losses, or liabilities incurred at any time by Plaintiffs as a result of having entered into the Coal Lease contract between Plaintiff Chaco and Co-conspirator Hospah dated April 15, 1977, as amended on February 12, 1981, the Surety Agreement between Plaintiff Texas Utilities and Defendant Hospah dated April 15, 1977, the Joint Development Agreements between Plaintiff Chaco and Defendant Thercol, dated January 26, 1977, and the Agreements of Sale and Purchase between Plaintiff Chaco and Defendant Thercol, dated January 26, 1977;

(f) that each Defendant, its subsidiaries, affiliates, successors, transferees, assignees, and the respective officers, directors, partners, agents and employees thereof, and all other persons acting or claiming to act on their behalf, be permanently enjoined and restrained from continuing, maintaining, renewing or asserting any rights under the contracts fraudulently induced and under the unlawful contracts, combination or conspiracy in restaint of the aforesaid trade and commerce, from continuing, maintaining or renewing the unlawful monopoliza-

tion, attempted monopolization, and combination and conspiracy to monopolize the aforesaid trade and commerce, and from adopting or following any course of conduct, practice, plan, program or device having a similar purpose or effect on the aforesaid trade or commerce; and

(g) that Plaintiffs have such other, further and different relief as the case may require and the court may deem just and proper under the circumstances.

Respectfully submitted,

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Dated: Dallas, Texas
December 18, 1981

APPENDIX E

EXCERPTS FROM COAL LEASE BETWEEN HOSPAH COAL COMPANY AND CHACO ENERGY COMPANY, EXECUTED APRIL 15, 1977, AS MODIFIED BY MODIFICATION NO. 1 EXECUTED FEBRUARY 12, 1981*

COAL LEASE

As Amended By Modification No. 1

SECTION 1. *Introduction.*

THIS COAL LEASE is dated and effective as of this 15th day of April 1977 between Hospah Coal Company, a Delaware corporation, and Chaco Energy Company, a New Mexico corporation.

SECTION 2. *Background and Recital.*

Hospah owns the mineral estate in the Hospah Properties and is the assignee of the State Coal Leases in Mc-

---

* The Coal Lease dated April 15, 1977, leased coal in the properties from the surface to the 150-foot Recovery Line (as defined in the Lease), with elections on Chaco's part to continue the Lease with respect to coal below the 150-foot Recovery Line to the 500-foot Recovery Line, in the absence of which elections the Lease would terminate as to coal below the 150-foot Recovery Line. Modification No. 1, executed February 12, 1981, leased all of the coal in the properties from the surface to the 500-foot Recovery Line, thereby increasing the amount of coal subject to the Coal Lease, added a section of land to the Coal Lease, and amended the Coal Lease in several respects. The Modification was executed February 12, 1981, by Hospah and Chaco in New Mexico; on that date, New Mexico counsel for TUC delivered to Hospah an opinion of counsel for TUC to the effect that the Surety Agreement executed by TUC on April 15, 1977, continued to be a valid and binding obligation of TUC notwithstanding execution of Modification No. 1 to the Coal Lease. See Affidavit of D. J. Walsh, R. Vol. I-210. The Coal Lease and Surety Agreement were attached as Exhibits C and A to the Complaint in the District Court. R. Vol. I-7, -42.

Kinley County, New Mexico. Hospah desires to have mined and sold whatever coal is located in the Properties.

Chaco is a mining and energy development company and a wholly owned subsidiary of Texas Utilities Company, a holding company for several electric utilities which anticipate a future need for coal as fuel. Chaco desires to mine and sell to the electric utilities, among others, whatever coal is located in the Properties.

Therefore, Hospah and Chaco have entered into this Lease and agree to the terms and conditions set forth herein.

* * * *

SECTION 4. *Leasehold Estate and Subleasehold Estate in Coal.*

(A) *Leasehold Estate.* Subject to the provisions of this Lease, Hospah hereby leases, lets and demises and by these presents does lease, let and demise to Chaco for the Term of this Lease the leasehold estate in coal in the Hospah Properties, subject to Section 11 together with the right, subject to the Hospah Instruments, to prospect for, mine and remove the coal, to have and to hold such leasehold estate, together with all and singular the rights, privileges, hereditaments and appurtenances thereto, to Chaco.

* * * *

(D) *Subleasehold Estate.*

(i) Subject to the provisions of this Lease, Hospah hereby subleases to Chaco the subleasehold estate in coal in the State Coal Properties subject to Section 11.

* * * *

SECTION 16. *Remedies.*

(A) *Choice of Law and Forum.* This Lease was executed in New Mexico, concerns land located in New Mex-

ıco, and will be performed in New Mexico. This Lease and all matters arising out of or relating to this Lease shall be governed and construed according to the law of New Mexico. Because New Mexico would be the only appropriate and convenient forum for any judicial proceeding involving this Lease, the Parties agree that all judicial proceedings arising out of or relating to this Lease shall be brought in New Mexico.

(B) *Available Remedies.*

(i) Except for the remedies of cancellation, and termination and for the provisions of Sections 16(D) and (E), all remedies available at law or in equity under the law of the State of New Mexico shall be available to Chaco or Hospah. The Parties intended that this Lease shall be specifically enforceable against either Party in the event of breach by such Party. . . .

* * * *

(D) *Limitation of Remedies.*

(i) In the event of breach of any of the provisions of this Lease, the other Party may seek damages from the breaching Party. Damages recoverable from a breaching Party in any action relating to or arising out of any provision of this Lease shall be limited to direct damages of the other Party. In no event shall either Party be liable to the other Party for any indirect, incidental, special or consequential damage, whether foreseeable or not, and regardless of whether the action seeking damages is brought upon a theory of breach of contract, tort, negligence, fraud, misrepresentation, breach of warranty, strict liability or otherwise.

* * * *

SECTION 17. *Resolution of Disputes.*

(A) *Matters Subject to Arbitration.*

* * * *

(ii) Chaco and Hospah specifically reserve their rights to take all other matters arising out of or related to this Lease to courts of competent jurisdiction pursuant to Section 16(A). The Parties agree that all legal proceedings brought by either Party involving a dispute arising out of or related to this Lease shall be brought in courts of competent jurisdiction in the State of New Mexico, which constitutes the only convenient forum for the resolution of any such dispute.

* * * *

SECTION 27. *Complete Agreement.*

This Lease together with the Surety Agreement is the complete and total expression of all agreements, contracts, covenants, and other promises between Chaco and Hospah relating to the leasehold estate in coal and the subleasehold estate in coal created by this Lease. All negotiations, understandings and agreements heretofore had between Hospah and Chaco are merged in this Lease, which solely and completely expresses their agreements and understandings. . . .

APPENDIX F

EXCERPTS FROM SURETY AGREEMENT

SURETY AGREEMENT

BETWEEN TEXAS UTILITIES COMPANY AND HOSPAH COAL COMPANY DATED APRIL 15, 1977

SURETY AGREEMENT

THIS SURETY AGREEMENT ("Surety Agreement") is dated and effective as of this 15th day of April, 1977, by and between TEXAS UTILITIES COMPANY, a Texas corporation ("TUC"), and HOSPAH COAL COMPANY, a Delaware corporation ("Hospah").

WHEREAS, TUC has caused the incorporation of Chaco Energy Company ("Chaco"), a New Mexico corporation, as a wholly-owned subsidiary of TUC, and contemporaneous with the delivery and effectiveness of this Surety Agreement, Chaco and Hospah have executed the Coal Lease dated as of the date of this Surety Agreement. The obligations of Chaco or its successors and assigns (including any mortgagee, pledgee, or security holder after realizing upon security) to pay money to Hospah arising out of the Coal Lease including, but not limited to, any right of Hospah to receive Royalty Payments as defined in the Coal Lease, Advance Royalty Payments as defined in the Coal Lease, indemnity payments, or payments for damages suffered by Hospah and arising out of any breach of the Coal Lease by Chaco, are referred to herein as the "Chaco Payment Obligations".

NOW THEREFORE, TUC and Hospah hereby agree to the terms and conditions of this Surety Agreement whereby TUC, in full recognition of the valuable and

substantial benefits which will accrue to it as a result of the execution and performance of the Coal Lease, unconditionally undertakes and assures the performance of the Chaco Payment Obligations, and unconditionally undertakes and assures the performance of all obligations of Chaco under the Coal Lease in the event of rejection of the Coal Lease as provided in Section 3(c) hereof. TUC expressly intends that Hospah may unconditionally rely upon this undertaking and assurance in executing the Coal Lease and further acknowledges the actual reliance of Hospah on this Surety Agreement in executing the Coal Lease.

1. Consideration:

In consideration of the execution by Hospah of the Coal Lease, TUC does hereby undertake and assure to Hospah, its successors and assigns, the full, prompt and complete performance by Chaco, its successors and assigns, of all of the Chaco Payment Obligations, which undertaking and assurance are unconditional and absolute. TUC agrees that the undertaking and assurance as set forth herein are and shall be primary obligations of, and fully and completely enforceable against, TUC. TUC acknowledges the receipt and adequacy of the consideration hereinabove recited and agrees that such consideration fully supports this Surety Agreement.

2. Hospah's Right to TUC's Performance:

It is expressly agreed that upon any default by Chaco, its successors or assigns of any of the Chaco Payment Obligations, as and when due, for any reason whatsoever, Hospah shall be entitled to performance by TUC of Chaco's Payment Obligations to the same extent as if TUC had signed the Coal Lease in Chaco's place.

3. Effect of Termination, Rescission, Cancellation, or Rejection of Coal Lease:

* * * *

(c) *Rejection.* In the event of rejection of the Coal Lease by any trustee in bankruptcy, or debtor-in-possession, or receiver, or by order of any court of competent jurisdiction, TUC shall immediately assume and be liable to perform, as the primary obligation of TUC, all obligations of Chaco under the Coal Lease including, but not limited to, the Chaco Payment Obligations, which Coal Lease is incorporated herein by reference . . . .

* * * *

5. Choice of Law:

The parties expressly agree that all questions and disputes arising out of or under this Surety Agreement including, but not limited to, questions and disputes concerning validity, interpretation, performance, remedies and enforcement, shall be resolved according to the law of the State of New Mexico.

Opposition

Office - Supreme Court, U.S.
FILED
MAY 11 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1996

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

HOSPAH COAL CO., *et al.*,

Petitioners,

v.

CHACO ENERGY COMPANY and
TEXAS UTILITIES COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

May 11, 1982

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QUESTION PRESENTED

On the facts of this case, did the court of appeals err in holding (i) that Petitioners' objections to venue in an action previously filed against them by Respondents should be raised in that prior action; and (ii) that Petitioners, having commenced a subsequent declaratory judgment action against Respondents in a different federal district court, involving the same issues as in the prior action, were not entitled to a preliminary injunction barring proceedings in that prior action?*

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* Pursuant to Supreme Court Rule 28.1, Respondent Texas Utilities Company states that it has no parent companies or affiliates. The only subsidiary of Texas Utilities Company that is not wholly-owned is Dallas Power & Light Company. Respondent Chaco Energy Company is a wholly-owned subsidiary of Texas Utilities Company; Chaco has no other parents or affiliates.

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No. 81-1996

IN THE

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OCTOBER TERM, 1981

HOSPAH COAL CO., *et al.*,

Petitioners,

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CHACO ENERGY COMPANY and
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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

The dispute between the parties in this case concerns which federal district court should determine where Respondents' antitrust and other claims against Petitioners should be tried. Respondents filed suit in the Northern District of Texas against three of the Petitioners and two other companies. Instead of contesting venue by the normal method of filing a motion pursuant to Fed. R. Civ. P. 12 and 28 U.S.C. §§ 1404, 1406, Petitioners thereafter commenced a declaratory judgment action against Respondents in the District of New Mexico and obtained a preliminary injunction barring proceedings in the prior Texas action. The court of appeals held that the injunction was improper and that Petitioners' objections to venue in Texas should be raised before the Texas court. The legal principles applied by the court of appeals are correct both in general and on the facts of this case. The decision below is in conflict with no decision of this Court or of the other courts of appeals, and Supreme Court review is unwarranted.

STATEMENT OF THE CASE

On December 18, 1981, Respondents Texas Utilities Company and Chaco Energy Company filed suit (the "Texas action") in the United States District Court for the Northern District of Texas against three of the four Petitioners here — Santa Fe Industries, Inc. (SFI), the Atchison, Topeka and Santa Fe Railway Company (SFR) and Santa Fe Mining, Inc. (SFM) — and two other companies, Thercol Energy Company and Peabody Coal Company. The Texas action complaint (Pet. App. 18a-40a) alleges that the defendants violated the Sherman Act (15 U.S.C. § 1, 2) and the New Mexico antitrust laws by participating in a continuing seven year conspiracy to fix the price and terms of sale of coal and to monopolize the production and transportation of coal from New Mexico's San Juan Basin Area. The coal involved was intended "for sale to generating plants in Texas and for sale to other customers in states other than the State of New Mexico." (Pet. App. 22a). The complaint also alleges that certain contracts were induced by fraud and that another contract is void due to a lack of consideration.

On December 21, 1981, three days after the Texas action complaint was filed, three of the Texas action defendants — Petitioners SFI, SFR and SFM — and Petitioner Hospah Coal Company, a non-defendant co-conspirator in the Texas action, filed a complaint against Respondents in the United States District Court for the District of New Mexico (the "New Mexico action"). The complaint in the New Mexico action seeks a declaratory judgment that Petitioners did not violate the antitrust laws or commit fraud as they are alleged to have done in the Texas action. Thercol and Peabody — two of the defendants in the Texas action with whom SFI, SFR and SFM are alleged to have conspired to fix prices — are not mentioned anywhere in the New Mexico action complaint.

On the same day they filed their complaint in the New Mexico action, Petitioners moved in the New Mexico court for a preliminary injunction restraining further proceedings in the Texas action. (R 86).[1] Petitioners based their motion on a clause in a contract between Chaco (one of the Texas action plaintiffs) and Hospah (a non-defendant in the Texas action) purporting to fix venue in the State of New Mexico in litigation between them arising out of the contract. (R 4). Neither Texas Utilities nor any of the Texas action defendants is a party to that contract, and none of the other six contracts which were executed pursuant to the price fixing conspiracy at issue in the Texas action contains such a clause. (Pet. App. 25a; R 111).[2]

On January 8, 1982, the New Mexico court granted Petitioners' motion for a preliminary injunction. (Pet. App. 12a-17a). The district court acknowledged the rule that a first-filed action should be allowed to proceed without interference, but concluded that this case came within

[1] References prefixed "R" are to the original record on appeal.

[2] On December 22, 1981, Respondents moved in the Texas court for a temporary restraining order and a preliminary injunction in order to protect their right to proceed with their prior pending action. On December 23, 1981, the Texas court denied the application for a temporary restraining order. (R 150). The Texas court disapproved of the efforts of Petitioners to circumvent normal procedures by filing what should have been a venue motion in Texas as a separate action and motion for a preliminary injunction in New Mexico. (R 147, 150). Additionally, the Texas court tentatively found "that probably the jurisdiction and the venue [are] here rather than elsewhere" and that the court in the first-filed action should be allowed to proceed. (R 149). However, the court declined, as a matter of comity, to restrain proceedings in the New Mexico court, finding that the extraordinary remedy of a temporary restraining order was unwarranted since Respondents had not shown that they would suffer immediate irreparable harm by having to respond to the preliminary injunction motion in the New Mexico court.

an exception to that rule for "vexatious" litigation. (*Id.* at 15a).

On interlocutory appeal pursuant to 28 U.S.C. § 1292(a)(1), the Court of Appeals for the Tenth Circuit unanimously held that the district court had erred in entering the preliminary injunction. The court of appeals recognized that Petitioners' New Mexico action was, in substance, nothing more than a challenge to venue in the first-filed Texas action. (Pet. App. 6a). The court acknowledged that "simply because a court is the first to obtain jurisdiction does not necessarily mean that it should decide the *merits* of the case." (*Id.* at 6a-7a). However, relying on well-established doctrine, the court held that, as a general rule, "the court which first obtains jurisdiction should be allowed to first decide issues of venue." (*Id.* at 4a, 7a). Otherwise, the court pointed out, the congressionally-established procedures for contesting venue (i.e., 28 U.S.C. §§ 1404, 1406; Fed. R. Civ. P. 12) would be "render[ed] ... little more than an exercise in futility." (Pet. App. 6a).

With regard to the venue selection clause on which Petitioners and the district court relied, the court of appeals expressed doubt as to whether the clause even applied (*id.* at 5a & n.2) and held that, in any event, the effect of the clause was a matter for the Texas district court to consider *(id)*. The court rejected Petitioners' contention that the venue selection clause "endow[ed them] with an absolute right to have every dispute between the parties litigated in the named forum." (*Id.* at 5a). The court of appeals ruled that Petitioners had not satisfied the requirements for an exception to the general rule barring injunctions against prior pending actions *(id.)* and the decision of the district court was accordingly reversed.[3]

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[3]The court of appeals also denied a motion to dismiss the appeal, which Petitioners had filed on the grounds that Respondents had waived their rights to proceed in Texas by instituting a

REASONS FOR DENYING THE WRIT

This is plainly not a case in which there are "special and important reasons" for granting certiorari. S. Ct. R. 17(1). To begin with, the court of appeals' decision correctly applied long-settled principles and reached the correct result on the record before it. The court of appeals held that the court in the first-filed action, rather than the court in the second action, should initially determine the district in which proper venue lies. The court ruled that an argument concerning venue based upon a venue selection clause, like any other objection to venue, can adequately be made in the court where the action is first filed. The court of appeals did not hold that venue selection clauses should not be enforced, as Petitioners would have the Court believe. The court's decision does not conflict with any decision of this Court or of the other courts of appeals. In addition, as the court of appeals' opinion suggests, the venue selection clause on which Petitioners rely is inapplicable here; and it is both inappropriate and unnecessary for this Court to review the extensive record in this case to determine what the court of appeals held to be a genuine question of fact as to whether the venue clause even applies. Finally, even under the rule of law Petitioners propose for permitting courts in second-filed actions to enjoin prior pending proceedings, Petitioners would not prevail because the "equitable considerations" and "balance of con-

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precautionary action against petitioners in the New Mexico court. (Pet. App. 8a). Petitioners' reference to that precautionary action here (Pet. 6 n.5) fails to mention that Respondents' complaint expressly reserved their rights "to appeal the entry of said preliminary injunction . . . and their rights to proceed in the Texas action against all parties-defendant therein . . . ." (R 342-43). The court's denial of Petitioners' motion was in accord with established precedent. *E.g.*, Cessna Aircraft Co. v. Brown, 348 F.2d 689 (10th Cir. 1965).

venience" point towards Texas, not New Mexico, as the appropriate forum.

I. The Court of Appeals correctly applied the governing legal principles on the record before it and its decision that the court in which an action is first filed should, in general, first decide questions of venue does not conflict with any decision of this Court or of the other Courts of Appeals

a. The court of appeals recognized that Petitioners' second-filed New Mexico action was nothing more than an attempt by Petitioners to avoid the requirements for challenging venue established by 28 U.S.C. §§ 1404, 1406 and Fed. R. Civ. P. 12(b). The court held that a party's venue objections are properly raised in the court in which the action is filed, not by filing a declaratory judgment action in the court to which the party wants the prior action transferred. The court of appeals therefore applied the rule that, there being no exceptional circumstances, the court in a second-filed action should not enjoin proceedings in a prior pending action, and reversed the preliminary injunction entered by the New Mexico district court. The circuit court's decision was plainly correct and presents no issue worthy of Supreme Court review.

As Justice Holmes put it, the rule is "well settled" that, where the same issues are presented in two courts of concurrent jurisdiction, "the court first seized should proceed to the determination without interference . . . ." *Rickey Land & Cattle Co. v. Miller & Lux,* 218 U.S. 258, 262 (1910); *see Peck v. Jenness*, 48 U.S. 611, 624, 7 How. 612, 625 (1849). Under this rule, the courts of appeals have uniformly held that "[i]n the absence of compelling circumstances the court initially seized of the controversy should be the one to decide whether it will try the case." *Mann*

Manufacturing, Inc. v. Hortex, Inc., 439 F.2d 403, 407 (5th Cir. 1971); *see, e.g., Washington Metropolitan Area Transit Authority v. Ragonese*, 617 F.2d 828, 830-31 (D.C. Cir. 1980); *O'Hare International Bank v. Lambert*, 459 F.2d 328, 331 (10th Cir. 1972); *National Equipment Rental, Ltd. v. Fowler*, 287 F.2d 43, 45-46 (2d Cir. 1961); *Martin v. Graybar Electric Co.*, 266 F.2d 202, 205 (7th Cir. 1959); *Crosley Corp. v. Westinghouse Electric & Manufacturing Co.*, 130 F.2d 474, 475 (3d Cir.), *cert. denied*, 317 U.S. 681 (1942).

In spite of the legion of cases supporting the first-filed rule, Petitioners nonetheless contend that there exists a "modern rule" that empowers district courts in second-filed actions to disregard priority of filing and instead issue injunctions against first-filed actions on a bare showing that "equitable considerations and the balance of convenience" point towards the second forum as appropriate. (Pet. 26). Clearly no such "modern rule" exists.

The amorphous "rule" espoused by Petitioners would affirmatively encourage duplicative litigation. Without the strong general rule prohibiting injunctions against first-filed actions, litigants who happen to be dissatisfied with venue in the first-filed action would be encouraged to file a second action in another federal district court and to move for a preliminary injunction against proceedings in the first-filed action instead of following the congressionally-established procedure for contesting venue by filing a motion in the first-filed action under Fed. R. Civ. P. 12 and 28 U.S.C. §§ 1404, 1406. The result would clearly be a proliferation of second-filed actions and, as the court of appeals pointed out, the congressionally-established procedure for contesting venue would be "render[ed] . . . little more than an exercise in futility." (Pet. App. 6a). The so-called "modern rule" proposed by Petitioners is simply nonexistent and, as the court below stated, would result in

"yet another weapon in a game of procedural warfare." (*Id.* at 8a).

As the court of appeals recognized (*id.* at 4a), where identical actions have been filed in different federal district courts, two separate questions are presented. The ultimate inquiry is with regard to which action should be the one to proceed, but the preliminary question is which court should make that determination. The cases cited by Petitioners all stand for the proposition — which the court of appeals did not contest (*id.* at 6a-7a) — that circumstances may exist in which the second action should be the one to proceed. However, the cases are unanimous in holding that the circumstances must be exceptional for a *second court* to be the one to make that determination by *enjoining the first*. *See, e.g., O'Hare International Bank v. Lambert,* 459 F.2d 328, 331 (10th Cir. 1972); *Mann Manufacturing, Inc. v. Hortex, Inc.,* 439 F.2d 403, 407 (5th Cir. 1971); *Commerce & Industry Insurance Co. v. Cablewave Ltd.,* 412 F. Supp. 204, 208 (S.D.N.Y. 1976). The court of appeals found no circumstances justifying departure from the first-filed rule.

Petitioners confuse the rule governing motions in first-filed actions seeking to enjoin proceedings in subsequent actions, where the considerations are similar to those underlying motions for transfer under 28 U.S.C. § 1404(a), with the rule applicable to injunctions against prior actions by district courts in second-filed actions. In deciding whether to grant a motion for transfer under 28 U.S.C. § 1404(a), the rule is that the plaintiff's choice of forum may be disturbed only if the balance of convenience weighs clearly and strongly in favor of the defendant. *See, e.g., Piper Aircraft Co. v. Reyno,* 102 S. Ct. 252, 265 (1981); *In re McDonnell-Douglas Corp.,* 647 F.2d 515, 517 (5th Cir. 1981). Similarly, the court in a first-filed action may decline to enjoin a second-filed action and stay its *own* proceedings

in favor of the second action if the court determines that a strong balance of convenience exists favoring the second forum. The cases on which Petitioners rely (Pet. 20-29) stand for that principle, nothing more.

To say that the court in a first-filed action should, on the basis of a strong balance of convenience, stay its own hand while allowing a second action to proceed is one thing. But it is far different to say that a mere balance of convenience entitles the court in the second action to *enjoin* proceedings in the first. The court of appeals was plainly right in ruling that, in the absence of exceptional circumstances, a defendant dissatisfied with the plaintiff's choice of forum cannot initiate duplicative litigation in a second federal district court and then have the prior action enjoined as a result of the "multiplicity of suits" thus created. The court's determination that no such exceptional circumstances are present on this record was correct (Pet. App. 5a; *see also infra* pp. 20-22) and, in any event, presents no issue warranting plenary review.

b. Petitioners' assertions that the court of appeals' decision conflicts with decisions of this Court and of other courts of appeals is but another attempt of a certiorari petitioner to manufacture a conflict where none exists. Contrary to Petitioners' assertions, the decision below is in complete accord with the precedents of this Court and the other federal circuits.

i. The decision below is clearly consistent with *Kerotest Manufacturing Co. v. C-O-Two Fire Equipment Co.*, 342 U.S. 180 (1952), as the court of appeals pointed out. (Pet. App. 7a). The first suit in *Kerotest* was instituted in Illinois by C-O-Two (a patentee) against Acme (one of Kerotest's customers) for patent infringement. Subsequently, Kerotest (the manufacturer of the alleged infringing device) filed an action against C-O-Two in Delaware for a

declaratory judgment of nonliability. Thereafter, C-O-Two amended its Illinois complaint, adding Kerotest as a defendant. Kerotest then moved in the Delaware action for an injunction barring C-O-Two from proceeding against it in Illinois; C-O-Two filed a cross-motion, requesting that the Delaware action be stayed. The district court granted Kerotest's motion and denied C-O-Two's. As a result, Kerotest was proceeding against C-O-Two in Delaware while at the same time C-O-Two was proceeding against Kerotest's customer in Illinois. 92 F. Supp. 943 (D. Del. 1950). The court of appeals reversed. Since the first-filed Illinois action was almost ready for trial, since all the parties were joined in the Illinois action, since Acme could not be made a party in Delaware, and since there was no reason for two trials rather than one, the circuit court concluded that the Delaware court should have stayed its own proceedings and refused to enjoin proceedings against Kerotest in the Illinois action. 189 F.2d 31 (3d Cir. 1951).

This Court affirmed the court of appeals in an opinion by Justice Frankfurter. Noting the "careful study of the circumstances of this litigation" by the court of appeals, the Court said: "Even if we had more doubts than we do about the analysis made by the Court of Appeals, we would not feel justified in displacing its judgment with ours." 342 U.S. at 184. The Court rejected Kerotest's effort to "stretch the Federal Declaratory Judgments Act to give [it] a paramount right to choose the forum" for trial, saying that a declaratory judgment plaintiff "is given an equal start in the race to the courthouse, not a headstart. If he is forehanded, *subsequent* suits against him . . . can within the trial court's discretion be enjoined . . . ." *Id.* at 185 (emphasis added). On the other hand, "[i]f he is anticipated . . . [and] is joined as an unwilling defendant in a *forum non conveniens,* he has available upon an ap-

propriate showing the relief provided by § 1404(a) of the Judicial Code." *Id.* at 186.

Kerotest is clearly consistent with the opinion below. This Court held that the proper procedure for contesting venue is to obtain relief pursuant to 28 U.S.C. § 1404(a), not to commence duplicative litigation in another forum. The Court emphatically rejected the declaratory judgment procedure as a device for obtaining "a paramount right to choose the forum" of the litigation, as did the court of appeals here. (Pet. App. 7a-8a).[4] Justice Frankfurter's opinion provides no support for any rule that would casually permit the court in the second action to enjoin proceedings in the first. To the contrary, the Court affirmed a decision in which such an injunction was reversed.[5]

Significantly, *Kerotest* demonstrates that in cases involving duplicative litigation, this Court will defer to the "exercise of discretion by the Court of Appeals below upon consideration of the specific circumstances" of the case. 342 U.S. at 183-85 & n.3. Where, as here, the court below has carefully reviewed the record before it and has determined that "[w]ise judicial administration" counsels against an injunction barring the prior pending action,

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[4] *Accord, e.g.*, Cunningham Bros., Inc. v. Bail, 407 F.2d 1165 (7th Cir.), *cert. denied*, 395 U.S. 959 (1969); Topp-Cola Co. v. Coca-Cola Co., 314 F.2d 124, 126 (2d Cir. 1963); National Cancer Hospital v. Webster, 251 F.2d 466, 468 (2d Cir. 1958) (L. Hand, J.), *cert. denied*, 361 U.S. 824 (1959) ("it is a 'perversion of declaratory judgment legislation . . . when it is used to anticipate the result of litigation pending in another forum' "); Tivoli Realty, Inc. v. Interstate Circuit, Inc., 167 F.2d 155 (5th Cir.), *cert. denied*, 334 U.S. 837 (1948).

[5] Nor was an injunction against prior proceedings involved in Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976).

id. at 183, the teaching of *Kerotest* is that intervention by this Court is unwarranted.

ii. There is also no conflict between the decision below and the decisions in *Columbia Plaza Corp. v. Security National Bank*, 525 F.2d 620 (D.C. Cir. 1975) and *William Gluckin & Co. v. International Playtex Corp.*, 407 F.2d 177 (2d Cir. 1969).

In *Columbia Plaza*, the first action was filed in the District of Columbia and the second action was filed in New York. Even though the issues were substantially the same, the District of Columbia court declined to enjoin the subsequent New York action. The court of appeals reversed, reasoning that only one action should proceed and that the District of Columbia was the more appropriate forum. Obviously *Columbia Plaza*, where it was held that the first court should enjoin proceedings in the second, is entirely consistent with the holding below that the determination as to which forum is more appropriate is a decision for the first court to make.[6]

The only appeals court decision cited by Petitioners where a second court was upheld in enjoining prior pending proceedings is the *Gluckin* case. *Gluckin* involved one of the rare and exceptional circumstances — known as the "customer suit exception" — that have been held to justify a departure from the first-to-file rule. Playtex, the patentee, sued Woolworth, a customer of Gluckin (the alleged infringing manufacturer) in Georgia on the pretext that Woolworth was selling the product involved at its store in

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[6]The lack of conflict between *Columbia Plaza* and the court of appeals' opinion is underscored by the District of Columbia Circuit's subsequent decision in Washington Metropolitan Area Transit Authority v. Ragonese, 617 F.2d 828 (D.C. Cir. 1980), where the court held that the "first-to-file" rule "mandated" that the prior suit be permitted to "run its course" unfettered. *Id.* at 831.

Gainesville, Georgia. Gluckin then commenced a declaratory judgment action in New York, and the New York district court enjoined further prosecution of the Georgia suit. In upholding the injunction, the circuit court emphasized that all three parties maintained their principal places of business in New York and that the witnesses with knowledge of the relevant facts relating to the alleged infringement were in New York. The court therefore held that there were "special circumstances justifying a departure from the 'first-filed' rule of priority" and invoked the "'customer suit' exception to the first-filed rule . . . ." 407 F.2d at 178.

The courts in the "customer suit" cases have recognized that alleged infringing manufacturers should not be subject to harassment by patentees filing suits against their customers in distant locations since the real dispute is between the patentee and the manufacturer. *See Kerotest Manufacturing Co. v. C-O-Two Fire Equipment Co.*, 342 U.S. 180, 186 (1952). The decision below is not inconsistent with these cases. The court of appeals here also recognized the existence of an exception allowing injunctions against prior actions where necessary "to prevent a misuse of litigation in the nature of vexatious and oppressive foreign suits." (Pet. App. 5a (quoting *O'Hare International Bank v. Lambert*, 459 F.2d 28, 331 (10th Cir. 1972))).[7] Moreover, in the customer suit cases such as *Gluckin*, the manufacturer does not have the option of pursuing the remedies provided by 28 U.S.C. §§ 1404, 1406 and Fed. R. Civ. P. 12(b) because the manufacturer is not a party to the suit in the distant

[7] Petitioners state that the court of appeals "did not question any of the trial Court's findings." (Pet. 29). This is totally incorrect. In addition to questioning, for example, whether the venue selection clause was applicable at all in the pending action (see *infra* pp. 15-16 & n. 9), the court of appeals specifically rejected the trial court's finding that the filing of the Texas action by Respondents was "vexatious." (Pet. App. 5a, 15a).

forum. The cases are therefore distinguishable and the intercircuit conflict alleged by Petitioners simply does not exist.[8]

II. The effect of a venue selection clause on the first-to-file rule is not a question presented by this case because the clause on which Petitioners rely is inapplicable here; and the Court of Appeals' holding that venue selection clauses, where applicable, should be enforced in the court where the action is first filed does not conflict with this Court's decision in Bremen

Petitioners ask this Court to resolve the question whether venue selection clauses may be enforced by the means chosen by Petitioners here — the initiation of duplicative proceedings in a second forum accompanied by a motion for a preliminary injunction. Petitioners contend that the court of appeals' resolution of the question is in conflict with this Court's decision in *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). In fact, however, the question Petitioners pose is not presented here, and there is no conflict between *Bremen* and the decision below.

a. Petitioners' entire argument as to whether the initiation of duplicative litigation is an appropriate way of en-

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[8]Each of the other circuit court cases relied on by Petitioners (Pet. 25-26) can easly be distinguished, for none of them involved the question whether an injunction against prior proceedings was appropriate. Del Mar Avionics v. Quinton Instruments Co., 645 F.2d 832 (9th Cir. 1981); Factors, Etc., Inc. v. Pro Arts, Inc., 579 F.2d 215 (2d Cir. 1978); American Civil Liberties Union v. Laird, 463 F.2d 499 (7th Cir. 1972); Small v. Wageman, 291 F.2d 734 (1st Cir. 1961). Nor does the *district court* opinion in Wheeling-Pittsburgh Steel Corp. v. Donovan Wire & Iron Co., 416 F. Supp. 602 (N.D. Ohio 1976), *aff'd mem.*, 577 F.2d 744 (6th Cir. 1978), conflict with the opinion below. The plaintiff in *Wheeling-Pittsburgh* filed actions in three different courts against the same defendant at approximately the same time. The district

forcing a venue selection clause necessarily *assumes* the existence of an applicable venue selection clause. In this case, however, the clause on which Petitioners rely is inapplicable.

None of the defendants in the Texas action, and only one of the two plaintiffs there, is a party to the coal lease containing the clause.[9] The lease itself is but one of six

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court therefore held that "the general rule that the court first acquiring jurisdiction of a controversy should enjoin subsequent proceedings therein in other jurisdictions does not apply." *Id.* at 603. As to the other district court opinions relied on by Petitioners (Pet. 26 n.22): Columbia Pictures Industries, Inc. v. Schneider, 435 F. Supp. 742 (S.D.N.Y. 1977) did not involve an injunction against a prior proceeding; Sybil Ives, Inc. v. Helene Curtis Industries, 249 F. Supp. 865 (S.D.N.Y. 1965) and Delamere Co. v. Taylor-Bell Co., 199 F. Supp. 55 (S.D.N.Y. 1961) involved the "customer suit exception" discussed above; and Sentry Corp. v. Conal Int'l Corp., 164 F. Supp. 770 (S.D.N.Y. 1958) involved similar extraordinary circumstances – the two critical (and independent, separately represented) parties, one of which was the party charged with the fraud in issue, were present only in the second action.

[9] Petitioners contend that Respondent Texas Utilities is bound by the coal lease because it signed a surety agreement guaranteeing Respondent Chaco's performance of the lease. (Pet. 18 n.15). However, the coal lease contains a specific provision (section 3(Y)) defining the "parties" bound by the lease and the only "parties" are Chaco and Hospah. The surety agreement contains no venue clause, and it imposes obligations upon Texas Utilities only in the event of a default by Chaco. No such default has occurred. Since a surety's obligations are defined by the surety agreement – not the underlying obligation – *e.g.*, Employment Sec. Comm'n v. C. R. Davis Contracting Co., 81 N.M. 23, 462 P.2d 608, 610 (1969), the court of appeals was, if anything, too generous to Petitioners in saying that "it is not readily apparent to us that the lease is binding on parties to this lawsuit who are not parties to the lease." (Pet. App. 5a n.2).

price-fixed contracts involved in the Texas action, and the antitrust violations alleged in that action do not spring from or appear in any particular contract. Rather, the antitrust violations arise from a long term course of conduct and concert of action among the Texas action defendants which began, as the court of appeals noted (Pet. App. 5a n.2), three years prior to the time the coal lease agreement was made.[10]

Respondents believe that the venue selection clause on which Petitioners rely is both inapplicable and, in the context of this case, unenforceable. (*See* Respondents' brief below, at 19-26). Even if such a clause were enforceable, its applicability in the pending action, in the words of the court of appeals, presents "a genuine issue of fact . . . ." (Pet. App. 5a n.2). This Court has recognized that such factual determinations are to be made by the lower courts, who "are in a far better position than we are" to determine the facts. *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 441 (1976). In all events, if this Court is to reach the question posed by Petitioners, the Court will have to, in essence, become a finder of fact by sifting through the factual record in this case just to determine whether sufficient facts exist to reach the question of the applicability of the clause. Issuance of certiorari for such a purpose is surely inappropriate in light of this Court's repeated admonitions that certiorari is not granted "to review evidence or discuss specific facts." *United States v. Johnston*,

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[10] Petitioners appear to suggest (Pet. 5) that the only relief sought in the Texas action is an injunction against further enforcement of the coal lease. On the contrary, the Texas complaint seeks damages and equitable relief far broader than such an injunction. (*See* Complaint ¶¶ (c), (f) & (g) (Pet. App. 39a-40a); *see also* Respondents' reply brief below, at 17-22). (Copies of the parties' briefs in the court below have been lodged with the Clerk of this Court).

268 U.S. 220, 227 (1925); *see United States v. ITT Continental Baking Co.*, 420 U.S. 223, 226-27 n.2 (1975); *NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498, 503 (1951); *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178 (1938).

b. Even if this were a case involving a clearly applicable and enforceable venue selection clause, there would be no conflict between *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) and the decision below.

Bremen held that venue selection clauses are generally enforceable except where "enforcement would contravene a strong public policy . . ., whether declared by statute or judicial decision . . . *e.g., Boyd v. Grand Trunk W. R. Co.*, 338 U. S. 263 (1949)" or where "enforcement would be unreasonable and unjust . . . ." 407 U. S. at 15. The Court's opinion did not address the question Petitioners claim to present here, i.e., whether such a clause is enforceable by the initiation of duplicative litigation in the selected forum.[11] Since the court below did not hold that the venue selection clause, if otherwise applicable and enforceable, could not be enforced, the conflict Petitioners purport to find between the decision below and *Bremen* does not exist.[12]

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[11] Nor was that question presented in Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974). In addition, both *Bremen* and *Scherk* are based in substantial part on international trade considerations which are not present here.

[12] Petitioners attempt to distort the court of appeals' citation of *Bremen* as holding that "courts 'dislike' venue selection clauses" and further that *Bremen* stands for "judicial dislike" of venue selection clauses. (Pet. 9). This is nothing more than a transparent effort to invent a conflict where none exists. The court of appeals did *not* interpret *Bremen* as standing for any "judicial dislike" of venue selection clauses; rather, the court quite properly

Moreover, the court of appeals was entirely justified in concluding that "[t]he existence of a venue selection clause does not impose an absolute duty nor does it endow a party with an absolute right to have every dispute between the parties litigated in the named forum." (Pet. App. 5a). Reliance on a venue selection clause is just one of the ways of contesting venue, and as the court of appeals held, venue challenges are properly raised in the court where an action is first filed. In every case of which Respondents are aware, including *Bremen* and all the other cases cited by Petitioners, the enforceability of the venue selection clause has been litigated without any difficulty in the first-filed action by filing a motion to stay, to dismiss for improper venue or to transfer to the selected forum. No venue clause has ever been enforced by an injunction of the sort reversed by the court of appeals here. The court of appeals' refusal to allow such injunctions imposes no substantial hardship on the contracting parties, *cf. Renegotiation Board v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974); *City of Parma v. Levi*, 536 F.2d 133, 135 (6th Cir. 1976), and is amply supported by the fact, as the court of appeals noted, that in many cases there will be a substantial question as to whether the venue selection clause controls. (Pet. App. 5a).[13]

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noted that the sweeping interpretation of the effect of venue selection clauses such as that urged by Petitioners had in fact led to the "*initial* dislike of the courts for such clauses," citing *Bremen*. (Pet. App. 6a). *See Bremen*, 407 U.S. at 9.

[13] The decision below is in harmony with the principle that equitable relief should be denied where the movant has an adequate remedy at law – here a motion to stay, dismiss or transfer in the Texas court. *See, e.g.*, Travis v. Pennyrile Rural Electric Cooperative, 339 F.2d 726, 729 (6th Cir. 1968). In fact, Petitioners *have* filed and, following the court of appeals' decision, fully briefed, motions in the Texas court to dismiss or transfer under 28

Petitioners' contention that they have an inviolable right to enforce the venue clause by an injunction issuing from the second court is based on the assumption that their rights will not adequately be protected by the first court. The court of appeals property responded to Petitioners' contention by invoking this Court's admonition that "[s]uch apprehension implies a lack of discipline and of disinterestedness on the part of the lower courts, hardly a worthy or wise basis for fashioning rules of procedure." *(Id.* at 7a n.3 (quoting *Kerotest Manufacturing Co. v. C-O-Two Fire Equipment Co.*, 342 U. S. 180, 185 (1952))).[14]

U.S.C. §§ 1404, 1406 and Fed. R. Civ. P. 12. Petitioners' argument that their legal remedy is inadequate because denial of a venue motion is not appealable as of right (Pet. 13) amounts to a direct attack on the strong policy against piecemeal review. Cobbledick v. United States, 309 U.S. 323, 324-25 (1940). That policy supports the circuit court's decision here. By generally precluding preliminary injunctions, the court's decision minimizes appeals and reduces delays. In this case, as a result of Petitioners' tactics, no discovery has been taken since the litigation began. Petitioners' assertion that "[a]ll of this uncertainty and delay was avoided" by the district court's injunction (Pet. 14 n.10) is disingenuous, to say the least.

[14] In Petitioners' quest for an answer to the question of why they simply do not present their objections to venue in the Texas action to the Texas court, Petitioners advance the wholly unsupportable assertion that the congressionally-established procedures of Fed. R. Civ. P. 12(b) and 28 U. S. C. §§ 1404, 1406 provide only "dubious and unpredictable methods" of challenging venue. (Pet. 13). In point of fact, however, the principal assumption on which Petitioners necessarily ground their excuse for not challenging venue before the Texas court is that a district judge in the first-filed action is somehow incapable of deciding the question of venue as they deem appropriate. Thus, Petitioners' reason, in effect, that their lack of confidence in their ability to convince the judge in the first-filed action of the correctness of their position should excuse them from even being required to litigate venue in that forum.

III. Petitioners would not prevail in this case even under the "equitable considerations and balance of convenience" test

Another reason exists for denying certiorari: Petitioners would not even prevail on the "equitable considerations and balance of convenience" test they propose.[15]

Several factors point towards the Northern District of Texas the most convenient and appropriate forum here. The injuries suffered in this case will be felt primarily in Texas. Texas Utilities is a Texas company which sought to purchase coal to be transported and sold to customers in Texas, and the conspiracy alleged in the Texas action is one in which the Texas action defendants fixed unreasonable prices and non-competitive terms of sale with respect to that coal.

None of the defendants in the first-filed Texas action is a New Mexico corporation. (Pet. App. 19a-21a). The principal "Santa Fe" defendant, Petitioner SFI (the parent company of Petitioners SFR, SFM and Hospah) is located not in New Mexico, but in Illinois. (*Id.* at 19a). Thercol, one of the key Texas action defendants, is a Texas joint venture. (*Id.* at 20a). The great majority of the witnesses

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[15]The "equitable considerations" advanced by Petitioners only serve to emphasize the duplicitive litigation which would be fostered by such a test. For example, Petitioners ask that in considering whether it should enjoin proceedings in the first-filed action, the second court consider factors such as the speed of service of process, the applicable law to be applied and the location of records and witnesses. (Pet. 27-28). Since various of these and other so-called "equitable considerations" will doubtlessly be present in a great many cases, defendants in first-filed actions would be encouraged to file a declaratory judgment action in the desired forum and seek a preliminary injunction against proceedings in the first-filed action.

for Respondents are located in Texas, as are their relevant documents. The great majority of the conduct at issue in the Texas action took place in Texas, Illinois and Missouri (the location of Peabody). (R 110). The leading negotiators for, and executives of, the defendants in the first-filed action are located in Texas, Illinois and Missouri (*id.*), and the 1976 contract which embodies the conspiratorial prices and terms of sale imposed by the Texas action defendants upon Respondents (Pet. App. 23a-25a) was negotiated and executed in Texas.[16] (Respondents' reply brief below, Exhibit A, affidavit of T. L. Austin, Jr., ¶ 20). Additionally, the fact that Texas was the chosen forum of the plaintiffs in this antitrust case is an important consideration militating against trial in New Mexico. *See, e.g., United States v. National City Lines,* 334 U. S. 573 (1948); *Industrial Investment Development Corp. v. Mitsui & Co.,* 671 F.2d 876, 890-91 (5th Cir. 1982); *Winder Industries v. Smiths Industries,* 1981-1 Trade Cas. ¶ 64,126, at 76,780 (D.N.J. 1981).

The relevant equitable considerations in this case and the balance of convenience clearly point towards Texas — not New Mexico — as the appropriate forum for trial.

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[16]Contrary to Petitioners' suggestion (Pet. 17 n.14, 27-28), Hospah — a minor conspirator that did not even come into existence until three years after the conspiracy began and one year after the conspirators imposed noncompetitive prices and terms upon Respondents — is clearly not an indispensable party in the Texas action. *See* Lawlor v. National Screen Service Corp., 349 U.S. 322, 330 (1955); United States v. National Lead Co., 332 U.S. 319, 327-28 (1947), *aff'g* 63 F. Supp. 513, 525 n.8 (S.D.N.Y. 1945); Georgia v. Pennsylvania R. Co., 324 U.S. 439, 463 (1945); PepsiCo, Inc. v. FTC, 472 F. 2d 179, 187-90 (2d Cir. 1972) (Friendly, J.), *cert. denied,* 414 U.S. 876 (1973).

Accordingly, even if the questions posed by the petition had any merit, this is not an appropriate case in which to address them. The decision below would have to be affirmed even under the rule of law Petitioners propose.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

May 11, 1982

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Petitioner's Reply Brief

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

HOSPAH COAL COMPANY, SANTA FE INDUSTRIES, INC., THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY and SANTA FE MINING, INC.,

Petitioners,

v.

CHACO ENERGY COMPANY and TEXAS UTILITIES COMPANY,

Respondents.

PETITIONERS' REPLY BRIEF TO RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

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PETITIONERS' REPLY BRIEF TO RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

I. THE BRIEF IN OPPOSITION FAILS TO DISGUISE THE IRRECONCILABLE CONFLICT BETWEEN THE DECISION BELOW AND THE DECISIONS OF THIS COURT AND OF OTHER CIRCUITS REJECTING THE PURPORTED FIRST-FILED RULE.

The Brief in Opposition does not address the tactical and procedural dilemna that the decision below, if permitted to stand, poses for parties to a freely bargained for forum selection clause. Respondents gloss over the real conflict between the decision of the Court below and this Court's holding in *Kerotest Manufacturing Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180 (1952) [hereinafter, *Kerotest*]. Petitioners' showing that the Tenth Circuit opinion conflicts with the decisions of this Court as well as other Circuits stands uncontroverted.

The Tenth Circuit opinion seeks to resolve the question as to "which court should make the determination on the . . . issue of venue" (App. A at 4a) by holding that only the court in the first-filed action may determine whether venue is appripriate, and then only through application of the Fed.R.Civ.P. 12(b) and 28 U.S.C. § 1404

(a) standards. The Tenth Circuit opinion further holds that a second-filed court may enjoin the parties conducting an earlier-filed action only when the other action is "vexatious and oppressive."[1] The Tnth Circuit's simplistic and inflexible rule directly conflicts with this Court's decision in *Kerotest* and decisions by the District of Columbia, Second and Sixth Circuit Courts of Appeals. The proposition also conflicts in principle with decisions of the First, Seventh and Ninth Circuit Courts of Appeal. *See, e.g., Small v. Wageman*, 291 F.2d 734 (1st Cir. 1961); *Del Mar Avionics v. Quinton Instruments Co.*, 645 F.2d 832, 836 (9th Cir. 1981); *American Civil Liberties Union v. Laird*, 463 F.2d 499, 501 n.2 (7th Cir. 1972). *See* Petition For Writ of Certiorari at 25-27 [hereinafter, Pet.]. The Tenth Circuit decision cannot be reconciled with this Court's holding in *Kerotest*, and the cases of other circuit courts of appeal following it, mandating that the trial judge be afforded "an ample degree of discretion" in determining in which action the parties should proceed, and rejecting the "rigid, mechanical" rule sought to be applied by Respondents. 342 U.S. at 183-84.

A. The Tenth Circuit Opinion Conflicts with *Kerotest*.

Respondents' abbreviated quotation of *Kerotest* (Res. Opp. at 10) omits operative language from that ruling which impacts on the issues raised by this Petition For Certiorari. This Court did not state in *Kerotest* that if a declaratory judgment plaintiff is anticipated in suit and is joined as an unwilling defendant in a *forum non conveniens*, the only remedy available to him is the relief provided by 28 U.S.C. § 1404(a). Rather, in *Kerotest*,

[1] Respondents engage in a studied mischaracterization of the Tenth Circuit's ruling as permitting a second-filed court to enjoin litigants before it from proceeding in a previously filed action whenever "exceptional circumstances" pertain. Respondents' Brief in Opposition at 6, 8, 9 [hereinafter, Res. Opp.]. In fact, the ruling does not speak to any circumstance in which an injunction may issue from the second-filed court except when the first action is "vexatious and oppressive."

this Court ruled that "the [district] court's discretion is broad enough to protect" a declaratory judgment plaintiff in a later-filed action. 342 U.S. at 186.

The Tenth Circuit ruled as a matter of law that the court in a subsequently filed action cannot enjoin defendants before it from proceeding as plaintiffs in a previously filed action absent a showing of "vexatious or oppressive litigation." Under the Tenth Circuit's ruling, a district court is prohibited from exercising its discretion to determine that a forum selection clause in the contract between the parties is a factor warranting the exercise of its equitable powers to enjoin the parties proceeding in another forum. The holding is, thus, irreconcilably in conflict with this Court's decision in *Kerotest*, which vests "an ample degree of discretion" in district courts. *Id.* at 183-84.

B. The Tenth Circuit Opinion Cannot be Harmonized with the Decisions of Other Circuits.

Respondents erroneously assert that there is no modern rule governing priority questions based on equitable considerations and the balance of convenience (Res. Opp. at 7), and that there is no conflict among the circuits (Res. Opp. at 12). Notably, Respondents' characterization of the holding in *William Gluckin & Co. v. International Playtex Corp.*, 407 F.2d 177 (2nd Cir. 1969) as being based on the "rare and exceptional circumstance" of the "customer suit exception" (Res. Opp. at 12-13) ignores the express ruling of the Second Circuit.

Gluckin adopts the proper standard to be applied when a preliminary injunction is sought in the subsequently filed court, and is in direct conflict with the holding of the Tenth Circuit. In *Gluckin*, the district court in the subsequently filed action enjoined the plaintiffs in the first-filed suit from proceeding. The Second Circuit upheld entry of the preliminary injunction, holding that the court below had properly exercised its discretion in considering "factors of substance indicating that the balance of convenience supported priority for the second-

filed suit." *Id.* at 179. The Second Circuit expressly discounted the mechanical application of nondiscretionary rules including the "customer suit" rule, relying on this Court's holding in *Kerotest*. The Circuit Court held that "an inflexible approach to suits of this type is certainly to be avoided. . . . [T]he so-called 'customer suit' exception . . . appears to be in conflict with a flexible approach." *Id.* The reasoning of the Court below and the Respondents herein irreconcilably conflicts with the holding of the Second Circuit.

Respondents neglect to even consider the Circuit Court for the District of Columbia's mandate that "choice of the forum cannot be suitably made by mechanical application of that [first-filed] principle." *Columbia Plaza Corp. v. Security National Bank*, 525 F.2d 620, 627 (D.C. Cir. 1975), cited with approval in *Colorado River Conservation Dist. v. United States*, 424 U.S. 800 (1975), *reh. denied*, 426 U.S. 912 (1976). *See* Pet. at 24-26. *See also Wheeling-Pittsburgh Steel Corp. v. Donovan Wire & Iron Co.*, 416 F.Supp. 602 (N.D. Ohio 1976), *aff'd.*, 577 F.2d 744 (6th Cir. 1978).

The circuits in conflict with the court below require a district court to exercise its discretion, by balancing and weighing equitable considerations in determining whether to enjoin an action pending in another federal court. Priority in filing time is simply one factor to consider. These were the guidelines followed by the New Mexico District Court.[2] The New Mexico court gave full weight to the equitable considerations and to the balance of convenience,[3] and exercised its discretion in determin-

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[2] Respondents incorrectly state that the district court "acknowledged the rule that a first-filed action should be allowed to proceed without interference." Res. Opp. at 3. In fact, in reference to the argument that the first-filed rule should control the jurisdiction of a federal court, the New Mexico District Court stated "the Court is not persuaded." App. C at 15a.

[3] Apparently in recognition of the fact that the "equitable considerations and balance of convenience test" may indeed apply, Respondents attempt to make factual arguments based on evidence

ing that TUC and Chaco should be enjoined from proceeding in the Texas Action. Among the court's findings was that Respondents' filing of their Complaint in the Texas Action, in the face of the forum selection clause setting venue in New Mexico, was "vexatious" and that it constituted "forum shopping". App. C. at 15a. Contrary to Respondents' argument, the New Mexico court was, in its analysis and balancing of these factors, simply demonstrating the "wise judicial administration" mandated by this Court in *Kerotest*, 342 U.S. at 183-84.

The Tenth Circuit's departure from the standards applied by this Court and other circuit courts of appeal is an anachronism and should not be allowed to stand. The decision resorts to a rule totally discarded by *Kerotest* and the other circuit courts applying its principles. Review by this Court now is necessary to resolve this real conflict and avoid needless litigation, confusion and expenditure of judicial resources.

II. THE CONFLICT BETWEEN THE TENTH CIRCUIT DECISION AND *M/S BREMEN* IS HIGHLIGHTED BY RESPONDENTS' ARGUMENT THAT A FORUM SELECTION CLAUSE IN A CONTRACT MAY *ONLY* BE ENFORCED BY THE COURT IN THE FIRST-FILED ACTION APPLYING THE STANDARDS OF 28 U.S.C. § 1404 and Fed.R.Civ.P. 12(b).

The Court of Appeals below held that motions in the first-filed action for dismissal or transfer pursuant to

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not before the New Mexico District Court. Res. Opp. at 20. The facts necessary to the trial court's findings were established by the pleadings, the agreements attached as exhibits and the Affidavit of D. J. Walsh (R. Vol. I-209). TUC and Chaco offered no opposing affidavits or testimony. In fact, Respondents' citation to the record (R. 110) for the proposition that the majority of the conduct at issue in the Texas Action took place in Texas, Illinois, and Missouri (Res. Opp. at 21) is simply an allegation of the Complaint as delineated in TUC and Chaco's Memorandum in Opposition to the New Mexico Plaintiffs' Motion for a Preliminary Injunction. This blatant attempt to create factual issues before this Court serves to underscore the propriety of the district court's decision on the record before it.

28 U.S.C. § 1404 and Fed.R.Civ.P. 12(b) are the only procedures available to enforce a forum selection clause in a contract.[4] App. A at 6a. Respondents assert that such a ruling does not conflict with *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) ([hereinafter, *M/S Bremen*], because the Tenth Circuit did not rule on the enforceability of the forum selection clause (Res. Opp. at 17). By taking that position, Respondents both misconstrue this Court's holding in *M/S Bremen* and completely fail to afford contractual forum selection clauses their due weight.[5]

A. The Standards Under 28 U.S.C. § 1404(a) or Rule 12(b) are Inadequate as the Sole Means for Enforcing Forum Selection Clauses.

The various tests of "propriety" and "convenience" to be considered by federal district courts in the exercise of their discretion regarding venue under Rule 12(b) or Section 1404 are entirely different than the rules this Court adopted in *M/S Bremen* concerning enforcement of forum selection clauses. *M/S Bremen* held that such clauses are "prima facie" valid and vested the district

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[4] In their Brief in Opposition, Respondents argue that Petitioners' reliance on a forum selection clause is simply an attempt to "avoid the requirements for challenging venue established by 28 U.S.C. §§ 1404, 1406 and Fed.R.Civ.P. 12(b)". Res. Opp. at 6. This argument ignores the fact that in the New Mexico Action, Petitioners seek specific performance of the forum selection clause. Thus, Respondents' characterization of the New Mexico and Texas Actions as being duplicative is entirely incorrect. In New Mexico, Petitioners base a cause of action upon specific performance of that provision of the contract (the forum selection clause) relied upon by the parties at the time the Coal Lease was entered into. *See, e.g., M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. at 12.

[5] Respondents attempt here (Res. Opp. at 15-16) as they did in the District Court and in the Tenth Circuit, to discount the effect of the forum selection clause by referring to the existence of "six other contracts" and to the presence of Thercol and Peabody in the Texas Action. After considering all evidence presented to it, the District Court concluded that the substance of the Respondents' Complaint centers around the Coal Lease containing the choice of forum provision. App. C. at 14a.

courts with discretion to give "effect to the legitimate expectations of the parties . . . by specifically enforcing" these contractual provisions. *M/S Bremen*, 407 U.S. at 11, 12. *See* Pet. at 12-15. Respondents confuse the application of established criteria to be applied by the district court in determining whether to transfer or dismiss for improper venue with this Court's mandate that reasonable forum selection clauses must be enforced.

In *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) [hereinafter, *Scherk*], this Court affirmed the holding in *M/S Bremen* that federal courts must give deference to and enforce reasonable forum selection contracts. In *Scherk*, this Court extended its analysis of forum selection contracts to arbitration clauses. The Court characterized arbitration clauses as a "specialized kind of forum selection clause that posits not only the situs of the suit but also the procedure to be used in resolving the dispute." *Id.* at 519. The heavy presumption in favor of upholding reasonable forum selection clauses in contracts was extended in that case to arbitration clauses as well.

This Court has held with respect to arbitration clauses, that: "An order to arbitrate a particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Gateway Coal Co. v. United Mine Workers of America*, 414 U.S. 368, 378-79 (1974), *citing*, *United Steel Workers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960). The same rule applies with respect to forum selection clauses. *M/S Bremen* held that forum selection clauses will be enforced unless the chosen forum "is so gravely difficult and inconvenient that [the party opposing enforcement] will for all practical purposes be deprived of his day in court." *M/S Bremen*, 407 U.S. at 18.[6]

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[6] Respondents, in a novel attempt to avoid the consequences of their contract, argue that the Coal Lease defines the "parties bound

The tests to be applied by a district court in determining whether to enforce a forum selection or arbitration clause are inconsistent with the "exclusive" procedural remedies advanced by Respondents. The standards under those procedures never consider whether "it may be said with positive assurance that the . . . clause is not susceptible of an interpretation that covers the asserted dispute." *Gateway Coal Co.*, 414 U.S. at 379. The procedures advanced by the Tenth Circuit and by Respondents herein cannot be the only means available for Petitioners to obtain specific performance of this provision in their contract. The practical effect of Respondents' argument is to relegate forum selection clauses to dubious and unpredictable methods of enforcement and to "allow the respondent to repudiate its solemn promise." *Scherk*, 417 U.S. at 520.

B. The Question Whether a Forum Selection Clause is Applicable Should Be Determined by the Court in the Designated Forum.

The basis for this Court's recognition of the heavy presumption favoring the enforcement of forum selection clauses is the elimination of the uncertainty and great inconvenience which results from permitting the parties

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by the lease" and the only parties are Chaco and Hospah. Res. Opp. at 15 n. 9. Respondents rely on Section 3(Y) of the Coal Lease. That section provides that "parties shall mean Chaco or Hospah" and in no manner states that those are the only "parties" bound by the Lease. The existence of the Surety Agreement itself controverts that argument. All of the provisions of the Coal Lease are incorporated into the Surety Agreement by reference. *See* Pet. at 3, 18, nn. 2, 15. The effect of this incorporation by reference is to bind TUC. *See, e.g., American Cas. Co. v. Brezina Const. Co.*, 295 F.2d 603, 607 n. 7 (8th Cir. 1961). Also, in a transparent attempt to avoid "its solemn promise," *Scherk v. Alberto-Culver Co.*, 417 U.S. at 520, to litigate in New Mexico, Respondents characterize Hospah as a "minor conspirator". Res. Opp. at 21, n. 16. Ironically, Plaintiffs entered into a billion dollar coal lease arrangement which the Texas Action seeks to cancel and under which the Texas Action seeks to measure damages with a corporation they now characterize as a "minor conspirator". The assertion is disingenuous at best.

to agree in advance to an acceptable forum.[7] *M/S Breman*, 407 U.S. at 12. The recognition by this Court in *Scherk* that arbitration clauses are simply a "specialized kind of forum selection clause" requires the conclusion that to foster certainty and convenience applicability of the forum selection clause must be determined by the court in the named forum. This Court has mandated that when an agreement contains an arbitration provision, the "question of the interpretation of the . . . agreement is a question for the arbitrator." *United Steel Workers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960). Similarly, the question of the applicability and interpretation of a forum selection clause should be determined by the court in the designated forum.

Committing the determination of applicability of these forum selection clauses to a court in the designated forum serves the policy of encouraging enforcement and performance of forum selection clauses. Following that reasoning, even if application of the forum selection clause is an "issue of fact" (*see* Tenth Circuit Opinion, App. at 5a n. 2), those issues must be determined by the forum designated in the contract. The New Mexico District Court considered and rejected Respondents' arguments against application of the forum selection clause.[8]

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[7] Petitioners have suffered further "uncertainty and inconvenience" since filing their Petition for Writ of Certiorari. The federal district court in Texas denied their request for an extension of time (pending the disposition of this Petition for Writ of Certiorari) to file briefs in support of their Motion to Dismiss for Improper Venue under Fed.R.Civ.P. 12(b) and Motion to Dismiss for Lack of an Indispensable Party. Accordingly, on May 7, 1982, Petitioners filed, in the Texas Action, briefs in support of those motions, and a Motion to Transfer pursuant to 28 U.S.C. §§ 1404(a) and 1406(a), and brief in support. Petitioners' Motions expressly reserved their rights under the Preliminary Injunction issued by the United States District Court for the District of New Mexico, under the Coal Lease, and otherwise to object to venue in Texas.

[8] Those arguments included the public policy arguments advanced by Respondents in this Court. (Res. Opp. at 17-19). The trial court

The Tenth Circuit opinion abrogates the validity and enforcement of forum selection clauses and is in conflict with *Bremen* and *Scherk*.[9]

CONCLUSION

For the foregoing reasons, Petitioners respectfully pray that a writ of certiorari should issue to review the Judgment and Opinion of the United States Court of Appeals for the Tenth Circuit.

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considered these arguments and squarely rejected them. *See* App. C. at 12a-17a. Respondents never allege that the forum selection clause itself was induced by fraud. *See Full-Sight Contact Lens Corp. v. Soft Lenses, Inc.*, 466 F.Supp. 71, 73 (S.D.N.Y. 1978). *See also* Pet. at 17.

[9] Respondents appear to suggest that *M/S Bremen* and *Scherk* are applicable only to international agreements. *See* Res. Opp. at 17 n. 11. No lower court has followed that interpretation of those cases. *See* Pet. at 8. If there is a question of applicability of *M/S Bremen* to interstate agreements, this Court should resolve it.